OMNIBUS VICTIMS PROTECTION ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON CRIMINAL LAW
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
SECOND SESSION
ON
S. 2420
A BILL TO PROTECT VICTIMS OF CRIME

MAY 27, 1982

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OMNIBUS VICTIMS PROTECTION ACT

THURSDAY, MAY 27, 1982

U. S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 6226, Dirksen Senate Office Building, Senator Paul Laxalt (acting chairman of the subcommittee) presiding.

Also present: Senator Heinz.

Staff present: John Nash, chief counsel and staff director; Susan Fanning, chief clerk; Bob Cynkar, general counsel; Anne Garrity, clerical assistant; Debbie Murdock, legislative assistant, Subcommittee on Regulatory Reform; and John Rother, staff director; Dave Lloyd, Paul Holm, Joseph P. Lydon, Catherine Milton, and Kate Clarke, Special Committee on Aging.

OPENING STATEMENT OF SENATOR PAUL LAXALT

Senator LAXALT. Let's be in order, please.

This morning, the Subcommittee on Criminal Law begins its consideration of S. 2420, the Omnibus Victims Protection Act of 1982. This legislation, introduced by my friend and distinguished colleague, Senator Heinz, represents an important legislative response to many of the problems and traumas suffered by countless thousands of victims and witnesses. The thrust of this legislation is to protect and enhance their role in our criminal justice system. This system, in the past, has shown a complete disregard for their most basic needs and requirements. Ironically, these are the very people who, without which, our systems of justice and law enforcement would surely collapse.

Too often, victims and witnesses have been the forgotten persons in our criminal justice system. This same system of justice, on the other hand, goes to extraordinary lengths to care for the convicted criminal. The very same criminal who does his utmost to make an otherwise peaceful society one filled with dread, fear, and violence.

It seems to me the time for talk is over. Now is the time for action. Victims of crime must not be victimized again by a system unwilling to meet their needs. Under this legislation, those criminals who seek to strike at the heart of the justice system itself, by intimidating witnesses and victims, will be dealt with severally. Additionally, Federal agencies charged with the custody of violent offenders will be forced to think twice before jeopardizing the rest of society by prematurely releasing the dangerous criminal.

S. 2420 will also require that trial judges be given presentence reports properly enriched by information stating the impact of the crime on the victim. The court will then be able to fashion a prison sentence more appropriate to the harm caused by the defendant. There is also a provision in this bill which will make it easier for the court to order restitution to crime victims. If the court does not order it, then it must state on the record its reason for not doing so. It is fully expected by the drafters of this bill that restitution of the victim be made a condition of parole or probation.

I will leave it to our witnesses to comment further on the many important provisions of this bill. Suffice it to say here that this legislative initiative represents an important step in reordering our systems of laws and justice. This bill correctly emphasizes the vital role victims play in bringing the criminal to justice.

At this time I would like inserted in the record the text of S. 2420.

[A copy of S. 2420 follows:]

II

97TH CONGRESS
2D SESSION

S. 2420

To protect victims of crime.

IN THE SENATE OF THE UNITED STATES

APRIL 22 (legislative day, APRIL 13), 1982

Mr. HEINZ (for himself, Mr. LAXALT, Mr. THURMOND, Mr. KENNEDY, Mr. HATCH, Mr. DECONCINI, Mr. BAUCUS, Mr. DOMENICI, Mr. PERCY, Mrs. KASSEBAUM, Mr. COHEN, Mr. DURENBERGER, Mr. CHILES, Mr. GLENN, Mr. PRYOR, Mr. BURDICK, Mr. GARN, Mr. DANFORTH, Mr. DIXON, Mr. MATSUNAGA, Mr. STEVENS, Mr. MELCHER, Mr. FORD, Mr. MOYNIHAN, Mr. MITCHELL, Mr. ABDNOR, Mr. EAGLETON, Mr. INOUYE, Mr. EXON, Mr. HAYAKAWA, Mr. SCHMITT, Mr. JACKSON, Mr. RIEGLE, and Mr. METZENBAUM) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To protect victims of crime.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Omnibus Victims Protection Act of 1982".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds and declares that:

(1) Without the cooperation of victims and witnesses, the criminal justice system would cease to func-

tion; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders.

(2) All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of the crime victim.

(3) Although the majority of serious crimes fall under the jurisdiction of State and local law enforcement agencies, the Federal Government, and in particular the Attorney General, has an important leadership role to assume in ensuring that victims of crime, whether at the Federal, State, or local level, are given proper treatment by agencies administering the criminal justice system.

(4) Under the current system law enforcement agencies must have cooperation from victims of crime and yet neither the agencies nor the law can offer protection or assistance when this same victim as a result of this cooperation, is threatened or intimidated.

(5) While the defendant is provided with counsel who can explain to him both the criminal justice process and the rights of the defendant, the victim or witness has no counterpart and is usually not even noti-

fied when the defendant is released on bail, the case is dismissed, a plea to a lesser charge accepted, or the court date changed.

(6) The victim and witness who cooperate with the prosecutor often find that the transportation, parking facilities, and child care services at the court are unsatisfactory; they must often share the pretrial waiting room with the defendant or his family and friends.

(7) The victim may lose valuable property to a criminal only to lose it again for long periods of time to Federal law enforcement officials, until the trial is over; many times that property is damaged or lost, which is particularly stressful for the elderly or poor.

(b) The Congress declares that the purpose of this Act is—

(1) to enhance, ensure, and protect the necessary role of crime victims and witnesses in the criminal justice process;

(2) to ensure that the Federal Government does all that is possible within available resources limits to assist victims or witnesses of crime without infringing on the constitutional rights of the defendant; and

(3) to provide a victim/witness model for State and local law enforcement officials.

TITLE I—VICTIMS IMPACT STATEMENT

SEC. 101. Subsection (c)(2) of rule 32 of the Federal Rules of Criminal Procedure is amended by adding at the end thereof the following new sentence: "The report shall also contain verified information stated in a nonargumentative style assessing the financial, social, psychological, and medical impact upon and cost to any person who was the victim of the offense committed by the defendant.".

TITLE II—PROTECTION OF VICTIMS AND WITNESSES FROM INTIMIDATION

SEC. 201. (a) Chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1512. Tampering with a witness, victim, or an informant

"(a) OFFENSE.—Whoever—

"(1) uses force, threat, intimidation, or deception with intent to—

"(A) influence the testimony of another person in an official proceeding; or

"(B) cause or induce another person to—

"(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

"(ii) evade legal process summoning him to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

"(iii) absent himself from an official proceeding to which he has been summoned by legal process; or

"(C) hinder, delay, or prevent the communication to a law enforcement officer of information relating to an offense or a possible offense;

"(2) with intent to annoy, harm, or injure another person, hinders, delays, prevents, or dissuades—

"(A) a witness or a victim from attending or testifying in an official proceeding; or

"(B) a witness, victim, or a person acting on behalf of a victim, from—

"(i) making a report of an offense or a possible offense to a judge, a law enforcement officer, a probation officer, or an officer of a correctional facility;

"(ii) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted or assisting in such prosecution or proceeding; or "(iii) arresting, or causing or seeking the arrest of, a person in connection with an offense; or

"(3) does any other act with intent to influence improperly, or to obstruct or impair, the—

"(A) administration of justice;

"(B) administration of a law under which an official proceeding is being or may be conducted; or

"(C) exercise of a legislative power of inquiry;

shall be punished as provided in subsection (b).

"(b) PUNISHMENT.—Whoever is guilty of an offense set forth in subsection (a)(1) shall be fined not more than $250,000, or imprisoned not more than six years, or both. Whoever is guilty of an offense set forth in subsection (a)(2) or (a)(3) shall be fined not more than $250,000 or imprisoned not more than three years, or both.

"(c) DEFINITIONS.—As used in this section—

"(1) 'witness' means an individual—

"(A) having knowledge of the existence or nonexistence of facts relating to an offense;

"(B) whose declaration under oath is received in evidence for any purpose;

"(C) who has reported an offense to a judge, a law enforcement officer, or probation officer, or an officer of a correctional facility;

"(D) who has been served with a subpena, including a grand jury subpena, issued under the authority of a court of the United States; or

"(E) who a reasonable person would believe to be an individual described in this paragraph; and

"(2) 'victim' means an individual against whom an offense has been or is being committed.

"(d) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1)(A) that the conduct engaged in to threaten or to intimidate consisted solely of lawful conduct and that the defendant's sole intention was to compel or induce the other person to testify truthfully. If the defendant raises such affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

"(e) DEFENSES PRECLUDED.—It is not a defense to a prosecution under this section that—

"(1) an official proceeding was not pending or about to be instituted; or

"(2) the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence.

"(f) JURISDICTION.—There is Federal jurisdiction over an offense described in this section if—

"(1) the official proceeding, offense, or prosecution is or would be a Federal official proceeding, offense, or prosecution;

"(2) the officer is a Federal public servant and the information or report relates to a Federal offense or a possible Federal offense;

"(3) the administration of justice, administration of a law, or exercise of a legislative power of inquiry relates to a Federal Government function;

"(4) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(5) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense or in the distribution of the proceeds of the offense.

"§ 1513. Retaliating against a witness or an informant

"(a) OFFENSE.—Whoever—

"(1) engages in conduct by which he causes bodily injury to another person or damages the property of another person because of—

"(A) the attendance of a witness or party at an official proceeding, or any testimony given, or any record, document, or other object produced, by a witness in an official proceeding; or

"(B) any information relating to an offense or a possible offense given by a person to a law enforcement officer; or

"(2) unlawfully subjects a Federal public servant or, with respect to a government contract, to economic loss or injury to his business or profession because of any matter described in subparagraph (A) or (B) of paragraph (1);

shall be punished as provided in subsection (b).

"(b) PUNISHMENT.—Whoever is guilty of an offense set forth in subsection (a)(1) shall be fined not more than $250,000 or imprisoned not more than three years, or both. Whoever is guilty of an offense in any other case under this section shall be fined not more than $250,000 or imprisoned for not more than one year, or both.

"(c) JURISDICTION.—There is Federal jurisdiction over an offense described in this section if—

"(1) the official proceeding is a Federal official proceeding;

"(2) the law enforcement officer is a Federal public servant and the information relates to a Federal offense or a possible Federal offense;

"(3) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(4) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.".

(b) The analysis for chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following new items:

"1512. Tampering with a witness, victim, or an informant.
"1513. Retaliating against a witness or an informant.".

(c) Subsection (a) of section 3146 of title 18, United States Code, is amended by adding at the end thereof the following: "Notwithstanding any other provision of this subsection, the pretrial release of any person pursuant to this section or section 3148 shall be deemed to include a condition that the defendant not commit any act proscribed by sections 1512 and 1513 of this title.".

SEC. 202. (a) Title 18 of the United States Code is amended by adding after chapter 223 the following new chapter:

"CHAPTER 224—PROTECTION OF WITNESSES

"Sec.
"3521. Witness relocation and protection.
"3522. Reimbursement of expenses.
"3523. Civil action to restrain witness or victim intimidation.
"3524. Definition for chapter.

"§ 3521. Witness relocation and protection

"(a) RELOCATION.—The Attorney General may provide for the relocation or protection of a government witness or a potential government witness in an official proceeding if the Attorney General determines that an offense described in section 1512 or 1513, or a State or local offense that is similar in nature or that involves a crime of violence directed at a witness, is likely to be committed. The Attorney General may also provide for the relocation or protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered.

"(b) RELATED PROTECTIVE MEASURES.—In connection with the relocation or protection of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General may take any action he determines to be necessary to protect such person from bodily injury, and otherwise to assure his health, safety, and welfare, for as long as, in the judgment of the Attorney General, such danger exists. The Attorney General may—

"(1) provide suitable official documents to enable a person relocated to establish a new identity;

"(2) provide housing for the person relocated or protected;

"(3) provide for the transportation of household furniture and other personal property to the new residence of the person relocated;

"(4) provide a tax free subsistence payment, in a sum established in regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

"(5) assist the person relocated in obtaining employment; and

"(6) refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure.

"(c) CIVIL ACTION AGAINST A RELOCATED PERSON.—Notwithstanding the provisions of subsection (b)(6), if a person relocated under this section is named as a defendant in a civil cause of action, arising prior to the person's relocation, for damages resulting from bodily injury, property damage, or injury to business, process in the civil proceeding may be served upon the Attorney General. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person relocated at his last known address. If a judgment in such an action is entered against the person relocated, the Attorney General shall determine whether the person has made reasonable efforts to comply with the provisions of that judgment. The Attorney General shall take affirmative steps to urge the person relocated to comply with any judgment rendered. If the Attorney General determines that the person has not made reasonable efforts to comply with the provisions of the judgment, he may, in his discretion, after weighing the danger to the person relocated, disclose the identity and location of that person to the plaintiff entitled to recovery pursuant to the judgment. Any such disclosure shall be made upon the express condition that further disclosure by the plaintiff of such identity or location may be made only if essential to the plaintiff's efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery.

Any such disclosure or nondisclosure by the Attorney General shall not subject the government to liability in any action based upon the consequences thereof.

"§ 3522. Reimbursement of expenses

"The provision of transportation, housing, subsistence, or other assistance to a person under section 3523 may be conditioned by the Attorney General upon reimbursement of expenses in whole or in part to the United States by a State or local government.

"§ 3523. Civil action to restrain witness or victim intimidation

"(a) INITIATION OF ACTION.—The Attorney General may initiate a civil proceeding to prevent and restrain an offense involving a witness or a victim under section 1512. Upon a finding, which may be based upon hearsay or the representation of the attorney for the government or the counsel for the defendant, that an offense under section 1512 involving a witness or a victim has occurred or is reasonably likely to occur, the court may order that a defendant, a witness, or other person connected with the case, or an individual in the courtroom—

"(1) refrain from engaging in conduct in violation of section 1512;

"(2) maintain a prescribed distance from a specified victim or witness; and

"(3) refrain from communicating with a specified victim or witness except under such conditions as the court may impose.

"(b) JURISDICTION.—A district court of the United States in which a proceeding is initiated under this section has jurisdiction to hear and determine the matter so presented, and to prevent and restrain an offense referred to in subsection (a). In a proceeding initiated under this section, the court shall proceed as soon as practicable to a hearing and determination.

"§ 3524. Definition for chapter

"As used in this subchapter 'government' includes the Federal Government and a State or local government.".

(b) The table of chapters for part II of title 18, United States Code, is amended by adding after the item for chapter 223 the following new item:

"224. Protection of witnesses .... 3521".

TITLE III—RESTITUTION

SEC. 301. (a) Chapter 227 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3579. Order of restitution

"(a) ORDER.—The court, in imposing a sentence on a defendant for any offense under this title, may order the defendant to make appropriate restitution. The order of restitution shall require that the defendant—

"(1) in the case of an offense causing bodily injury or death, make restitution to the victim of the offense or estate of the victim in an amount that does not exceed the expenses necessarily incurred by the victim for medical services and, if applicable, the expenses for the funeral and burial of the victim; or

"(2) in the case of an offense in the course of which the defendant unlawfully obtained, damaged, or destroyed the property of another—

"(A) restore the property to the victim of the offense; or

"(B) make restitution to the victim of the offense in an amount that does not exceed the value of the property; and

"(3) make such other restitution as the court deems appropriate.

If the court does not order restitution, the court must state for the record the reasons. The court shall limit the order of restitution to the extent necessary to avoid unduly complicating or prolonging the sentencing process.

"(b) RELATIONSHIP TO CIVIL PROCEEDINGS.—The court shall not order restitution as to any victim who is bound by a judgment entered in, or a settlement of, a civil proceeding involving the same injury, obtaining, damage, or destruction. Any amount paid to a person pursuant to an order of restitution shall be set off against an amount otherwise recoverable by such person in any civil proceeding. The fact that restitution was ordered or paid shall not be admissible in evidence in the trial of any civil proceeding. Notwithstanding any other provision of law, an order of restitution shall be satisfied by the defendant before any Federal lien.

"(c) RESTITUTION AS CONDITION.—If a defendant is placed on probation or paroled pursuant to this title any restitution ordered under this section shall be a condition of such parole or probation. Failure to comply with an order of restitution shall be grounds for the revocation of parole or probation.".

(b) The analysis for chapter 227 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"3579. Order of restitution.".

(c) Within six months after the date of enactment of this title, the Attorney General shall report to Congress concerning any laws necessary to ensure that all victims of crime are justly compensated in those cases where restitution is not possible. The Attorney General shall consider funding methods such as imposing additional fines on all individuals convicted of Federal crimes.

TITLE IV—FEDERAL ACCOUNTABILITY FOR ESCAPE OR RELEASE OF A FEDERAL PRISONER

SEC. 401. (a) Section 1346(b) of title 28, United States Code, is amended by inserting "(1)" immediately after "(b)".

(b) Section 1346(b) of title 28, United States Code, is amended by adding at the end thereof the following:

"(2)(A) Subject to the provisions of chapter 171 of this title and subparagraph (B) of this paragraph, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of any civil action on a claim against the United States for damages, accruing on and after the date of enactment of this paragraph, for injury or loss of property, or personal injury or death directly caused by any dangerous offender charged with or convicted of a Federal offense who is released from, or who escapes from, lawful custody of an employee of, or any person acting as the lawful agent of, the United States as a result of the gross negligence of such employee or person.

"(B) For the purposes of this paragraph—

"(i) 'gross negligence' includes the failure to warn reasonably forseeable victims that the person charged with or convicted of the offense was released or has escaped, or the violation of a statute, regulation, or court order which results in such release or escape; and

"(ii) 'dangerous offender' means a person charged with or convicted of a crime involving the use, attempted use, or threatened use of violence against the person or property of another.".

TITLE V—FEDERAL GUIDELINES FOR FAIR TREATMENT OF CRIME VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM

SEC. 501. (a) Within six months after the date of enactment of this title, the Attorney General shall develop and implement guidelines for the Department of Justice consistent with the purposes of this Act. In preparing the guidelines the Attorney General shall consider the following objectives:

(1) SERVICES TO VICTIMS OF CRIME.—Law enforcement personnel should ensure that victims routinely receive emergency social and medical services as soon as possible and are given information on the following—

(A) availability of crime victim compensation (where applicable);

(B) community-based victim treatment programs;

(C) their role in the criminal justice process, including what they can expect from the system as well as what the system expects from them;

(D) key points in the criminal justice process at which they might want to request information as to the status of their particular case and suggestions on how best to request this information; and

(E) ability of law enforcement officers to protect victims and witnesses from intimidation.

(2) Scheduling changes.—All victims and witnesses who have been scheduled to attend criminal justice proceedings should either be notified as soon as possible of any scheduling changes which will affect their appearances or have an "on call" or telephone alert system available.

(3) Prompt notification to victims of major serious crimes.—Victims and witnesses of serious crimes should be given the opportunity to request advance notification of important criminal justice proceedings. Victims and witnesses who provide the appropriate official with a current address and telephone number should receive prompt advance notification of all judicial proceedings relating to their case, including—

(A) arrest or initial appearance before a judicial officer of the accused;

(B) initial bond decision of the accused; and

(C) disposition of the case (including trial, sentencing, and eventual release of accused).

(4) CONSULTATION WITH VICTIM.—The prosecution should obtain the views of victims of serious crimes, or in the case of a minor child or homicide, the victim's family, prior to making a recommendation to the court, when the victim has provided a current address and telephone number. These views would be nonbinding. The key points for consultation include—

(A) dismissal;

(B) plea negotiations;

(C) pretrial release hearings (if feasible); and

(D) pretrial diversion program.

(5) SEPARATE WAITING AREA.—Victims and witnesses should be provided with a separate waiting area during court proceedings that is separate from all but prosecution witnesses.

(6) PROPERTY RETURN.—Law enforcement agencies and prosecutors should promptly return victim's property held for evidentiary purposes unless compelling law enforcement reason for retaining.

(7) Notification to employer.—Victim and witness should be asked if they would like their employer to be notified of need for victim/witness to cooperate and, therefore be absent from work. If the victim or witness has to take time off from work to assist in the investigation or prosecution of the case, employers should be encouraged to continue to pay the victim or witness as if they had actually worked. In situations when as a direct result of a crime or cooperation with law enforcement officials, the victim or witness is subjected to serious financial strain, a law enforcement official should offer to contact creditors to explain the circumstances.

(8) Training by federal law enforcement training facilities.—The Attorney General and Secretary of the Treasury should instruct the directors of the Federal training facilities to ensure that victim assistance training be offered to law enforcement so that victims are assisted properly immediately following the commission of crime and throughout the duration of the criminal justice proceedings; and to ensure that criminal justice personnel are familiar with these guidelines.

(9) General victim assistance.—The guidelines should also ensure that when feasible other im-

portant means of assisting victims and witnesses, such as the adoption of transportation, parking, and translator services for victim in court are provided.

(b) Nothing in this title shall be construed as creating a cause of action against the United States.

SEC. 502. All Federal law enforcement agencies, outside of the Department of Justice, shall adopt guidelines consistent with section 501.

TITLE VI—PROFIT BY A CRIMINAL FROM SALE OF HIS STORY

SEC. 601. Within one year after the date of enactment of this title, the Attorney General shall report to Congress regarding any laws that are necessary to ensure that no Federal felon derives any profit from the sale of the recollections, thoughts, and feelings of such felon with regards to the offense committed by the felon until any victim of the offense receives restitution.

○

Senator **Laxalt**. I look forward to the testimony of our witnesses and I wish to express my personal gratitude to the victims who have agreed to testify. Despite the tragedy of their victimization, they continue to perform, through their testimony, a vital role in helping the Congress draft appropriate legislation.

I notice that my distinguished colleague, Senator Heinz, is here, and I understand, Senator, you are prepared to offer a statement.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator **Heinz**. Yes, but at the outset I would like to thank you for chairing this hearing, for the work that you and your staff have done in shaping this legislation, S. 2420. I would like to place my entire statement in the record and make some brief remarks, if I may.

Senator **Laxalt**. Without objection, it is so ordered.

Senator **Heinz**. I greatly appreciate the opportunity to comment on the bill, S. 2420, the Omnibus Victims Protection Act of 1982, which you and I introduced on April 22 of this year. Forty-one of our colleagues now cosponsor this legislation.

Mr. Chairman, on September 22 of last year, I chaired the Senate Special Committee on Aging hearing on older Americans fighting the fear of crime. The hearing revealed with shocking clarity that the criminal act itself was just the beginning of a long, lonely and often threatening process for the victim. We learned that as a result of their contact with the criminal justice system, elderly victims experience lost dignity, frustration, helplessness and a feeling of justice denied.

VICTIMIZED TWICE

In other words, we found the victims of crime in our society are usually victimized twice, once when they are robbed or assaulted or raped by the criminal, and the second time by the shabby treatment they receive in our current criminal justice system.

Mr. Chairman, it is a real doublecross when our criminal justice system responds much better to the criminal than to the victim and that doublecross of the honest citizen unfortunately happens every day.

In our criminal justice system, a good citizen who becomes a victim is expected to cooperate with the police and prosecutors' offices by giving information and working to bring the criminal to justice. Yet, he is almost never given the same courtesy of cooperation and shared information as is the criminal.

In reality, the system is set up in such a way that it keeps the criminal informed and enlightened while the victim remains in the dark not knowing what is going on.

The criminal is provided a lawyer, even if he can't afford one. He is advised of his rights throughout the proceeding and is given free medical care if needed when incarcerated.

Victims, however, are on their own. Except in a few jurisdictions with a good victim advocate program, victims normally receive no explanation of the steps of the criminal justice process and so are often totally unaware of how the case will proceed. Oftentimes, victims will show up at court only to find that the hearing date has been changed or the case dropped entirely, and seldom is the victim compensated for his loss due to the crime, unless he has personal insurance.

TESTIMONY OF VICTIMS

Today, we will hear testimony from people who have been victimized by our justice system. Virginia Montgomery will tell us how she received a bureaucratic runaround, never being informed of the sentence her assailant received, never knowing if her case would be heard.

We will also hear today from a woman who was raped, kidnaped and robbed at gunpoint, and during the judicial process was ignored and intimidated and humiliated.

These two victims are just two examples of what happens to thousands and thousands of victims. Even as we sit here, Mr. Chairman, even as we sit here today there are hundreds of victims around the country who are going through the obstacle course of our so-called justice system. As we sit here, chances are there is at this moment a victim in a courtroom somewhere being told, "sorry, but your case has been dropped." "Sorry, but your court date has been changed." "Sorry, but your assailant is out on probation because his case was plea bargained." "Sorry, but there is no way anyone can help you with your medical bills." "Sorry, we are too busy to track down that crank call,"a call the victim has received threatening him or his family if he decides to testify or cooperate with the police.

Mr. Chairman, "sorry" is the frustrating response that so many of our victims get. "Sorry" is the response they all too often receive, and "sorry" also describes the sorry justice system we condone which accords more concern for the accused than the hapless victim.

OMNIBUS VICTIMS BILL—S. 2420

To remedy what is going on today, Mr. Chairman, our bill, S. 2420, was drafted. We believe it is a comprehensive answer to assisting victims of crime. We believe it will rebalance the scales of justice.

Mr. Chairman, I would add that the bill was drawn up with the help of many people. This includes such organizations as the American Bar Association, the American Civil Liberties Union, several retired citizens' organizations, many victims' groups, legal groups, and of course the Department of Justice. It will not require that new Federal funds be spent to help victims, but rather will redirect existing resources.

For example, one of the requirements of the bill is that a victim's impact statement be included in the presentence report that goes to the judge. Currently, this report contains information on the convicted felon, but nothing about the postcrime status of the victim. That omission, Mr. Chairman, again not only gives the victim the impression that no one in the system cares, but it also encourages the career criminals who commit most of these crimes to continue to select victims who are frail, elderly, helpless, and to do so again and again.

Mr. Chairman, there are a number of other provisions in this bill. I won't take a lot of time to explain them. I will just enumerate that the bill provides criminal penalties for the intimidation of or the retaliation against witnesses or victims.

It broadens the authority of the Attorney General regarding protection or relocation of witnesses;

It gives the Attorney General civil action authority to prevent and restrain offenses against victims;

It provides for restitution to be ordered in crimes involving loss of property or personal injury unless the judge states why restitution should not apply;

It provides for the development of Federal guidelines setting in place practices to insure the fair treatment of victims and witnesses by the criminal justice system;

It mandates the development of a Federal standard prohibiting felons from receiving financial profit due to the notoriety of their crime by selling movie, television or book rights, for example;

It makes the Federal Governnent legally accountantable for the grossly negligent early release of dangerous persons from a Federal facility who subsequently commits a crime.

Mr. Chairman, in your statement you said the time for talk is over and the time for action is now. I fully agree. Our criminal justice system could not function properly without the full cooperation and participation of the victims and witnesses.

But we cannot in good conscience continue to urge people to report crimes, to come forward with information, to pore over mug shots when they are treated with callous indifference by officials in the system. The Omnibus Victims Protection Act, S. 2420, seeks to correct this insensitivity of the criminal justice system. Its enactment would put renewed meaning behind the words "equal justice for all."

Senator **Laxalt**. I thank the Senator. In addition, I ask unanimous consent that the Senator be permitted to join me in the course of the hearing.

Senator **Heinz**. I am very grateful.

[The prepared statement of Senator Heinz follows:]

Prepared Statement of Senator John Heinz

Before I begin my testimony, I would like to thank Senator Laxalt for chairing this hearing. I also would like to congratulate him and his staff for their support in shaping this legislation we have before us today.

I would like to place the full text of my statement in the record and make some brief remarks.

I greatly appreciate the opportunity to comment on S. 2420, the Omnibus Victims Protection Act of 1982, which I introduced with Senator Laxalt on April 22, 1982. Forty-one of my colleagues now cosponsor this legislation. I believe S. 2420 will help rebalance the scales of justice.

On September 22, 1981, I had the priviledge of chairing a hearing before the Senate Special Committee on Aging entitled "Older Americans Fighting the Fear of Crime". The hearing revealed that the criminal act itself was just the beginning of a long, lonely and unpleasant process for most elderly victims that usually resulted in lost dignity, frustration, helplessness and a feeling of justice denied. We discovered, in other words, that victims of crime in our society are often victimized twice through their experience. They are robbed or assaulted or raped by the criminal;

and then when they participate in our current criminal *"justice"* system they are again taken advantage of and treated shabbily.

Our criminal justice system often responds much better to the criminal than to the victim. There is a subtle double-cross here! In our criminal justice system a good citizen who becomes a victim is expected to cooperate with the police and prosecutors' offices in giving information, in working to bring the criminal to justice, yet is never given the same courtesies of cooperation and shared information. In reality the system is set up in such a way that it keeps the criminal informed and enlightened while the victim remains in the dark—not knowing what is going on.

The criminal is provided a lawyer even if he cannot afford one, is advised of his rights throughout the proceedings, and is given free medical care, if needed, while incarcerated. Victims, however, are on their own. Except in the few jurisdictions with good victim advocate programs, victims normally receive no explanation of the steps of the criminal justice process and so are often totally unaware of how the case will proceed. Oftentimes the victim will show up at court only to find that the hearing date has been changed or the case dropped entirely. And very seldom is the victim compensated for his losses directly related to the crime unless he has personal insurance.

Today we will hear testimony from people who have been victimized by our justice system. Virginia Montgomery will tell us how she received a bureaucratic runaround, neven being informed of the sentence her assailant received, and never knowing if the case was ever heard.

Today we will hear from a woman who was raped, kidnapped and robbed at gunpoint, and then during the judicial process was humiliated, ignored, intimidated, and greatly disappointed by an unjust judicial system.

These two victims are unfortunately just two examples of what happens to thousands and thousands of victims. Even as we are sitting here today there are hundreds of victims around the country who are going through the obstacle course of our so-called justice system. As we are sitting here there is some victim at the courthouse right this moment being told: "Sorry but your court date was changed" or "Sorry your case was dropped" or "Your assailant is out on probation because his case was plea bargained" or "Sorry but there is now way anyone can help you with your medical bills." Or even worse, there is a victim receiving a telephone call threatening him or his family if he decides to testify or cooperate with the police.

To remedy what is going on today, Senator Laxalt and I have drafted comprehensive legislation to assist victims of crime.

The bill was drawn up with the help of such organizations as the American Bar Association, the American Civil Liberties Union, several retired citizens organizations, victims groups, legal groups, and the Department of Justice. It will not require that new federal funds be spent to help victims but, rather, will redirect existing resources. For example, one of the requirements of the bill is that a victims impact statement be included in the pre-sentencing report that goes to the judge. Currently, this report contains information on the convicted felon but nothing about the post-crime status of the victim. This omission again gives the victim the impression that no one in the system cares.

The bill would also:

Provide criminal penalties for the intimidation of or retaliation against witnesses or victims;

Broaden the Attorney General's authority regarding protection or relocation of witnesses;

Give the Attorney General civil action authority to prevent and restrain offenses against victims;

Provide for restitution to be ordered in crimes involving loss of property or personal injury unless the judge states why restitution should not apply;

Provide for the development of Federal guidelines setting in place practices to ensure the fair treatment of victims and witnesses by the criminal justice system;

Mandate the development of a Federal standard prohibiting felons from receiving financial profit due to the notoriety of their crime by selling movie, television or book rights, for example:

Make the Federal Government legally accountable for the negligent early release of dangerous person from a Federal facility who subsequently commits a crime.

Our criminal justice system could not function successfully without the full cooperation and participation of victims and witnesses. But we cannot in good conscience continue to urge people to report crimes, to come forward with information, to pour over mug shots when they are treated with callous indifference by officials in the system. The Omnibus Victims Protection Act (S. 2420) seeks to correct this insensitivity of the criminal justice system. Its enactment would put renewed meaning behind the words "equal justice for all."

Senator LAXALT. We are pleased to have here Congressman Hamilton Fish, Jr. He has a good perspective on this problem. Congressman, I know that you folks in the House are beset by budget problems.

Congressman FISH. Fourteen hours a day.

Could I be joined by Miss Deborah Owen? She is the Republican counsel—we still have to call them the minority in the other body—of the Crime Subcommittee, on which I have the honor to serve.

STATEMENT OF HON. HAMILTON FISH, JR., A U.S. REPRESENTATIVE FROM THE STATE OF NEW YORK, ACCOMPANIED BY DEBORAH OWEN, MINORITY COUNSEL, HOUSE SUBCOMMITTEE ON CRIME

Congressman FISH. Mr. Chairman, I suspect there will be rejoicing today among the "forgotten" victims of crime in this country at the prospect of long-overdue legislative activity to address the problems that they encounter in the Federal criminal justice system. As a victim of crime myself, and on behalf of the National Victims of Crime organization, I want to commend this subcommittee, and you in particular, Mr. Chairman, for holding these hearings, which constitute the first step toward enacting legislation in the 97th Congress.

As you know, Mr. Chairman, our respective counsels have been working since the beginning of this Congress to fashion a legislative program which would not only adequately respond to the needs of victims, but which would have bright prospects for prompt passage. Although the delay in fashioning that package has been frustrating at times, I believe that it has afforded us ample opportunity to develop a bipartisan package that will be acceptable to the administration, both Houses of Congress, and various concerned organizations.

I want to take this opportunity to welcome the distinguished Senator from Pennsylvania, Mr. Heinz, into our crusade and to commend him and his staff on his own initiatives in this area. I look forward to working with both of you and with our other concerned friends in what will undoubtedly be a successful effort to pass legislation that will serve as a model to all of the States.

Mr. Chairman, I am today introducing in the House of Representatives the Omnibus Victim-Witness Protection and Assistance Act of 1982, which is intended to serve as a companion measure to S. 2420. It is nearly identical, not only to that bill, but to the provisions included in the bipartisan omnibus violent crime bill introduced yesterday, in that it includes the following major elements:

One, it requires that the presentence investigation report provided to the judge include an assessment of the harm done to, or loss suffered by, the victim.

Two, it creates new offenses relating to victim/witness tampering and retaliation to supplement and strengthen existing offenses in chapter 73 of title 18.

Three, it requires the judicial officer to impose a mandatory condition on pretrial release that the defendant refrain from engaging in victim-witness intimidation and retaliation.

Four, it enhances the witness relocation and protection programs.

Five, it permits the Attorney General to file for a restraint against victim/witness intimidation.

Six, it authorizes the courts to impose a sentence of restitution for title 18 offenses.

Seven, it creates a cause of action against the United States for damages resulting from the grossly negligent release of a dangerous offender by Federal custodial officials.

Eight, it establishes standards for the fair treatment of victims of crime in the Federal criminal justice system.

Nine, it requires the Attorney General to report to Congress on the need for victim compensation legislation and legislation to prohibit criminals from profiting from their misdeeds.

Mr. Chairman, my bill does contain some differences from S. 2420, which I submit for this subcommittee's consideration:

One, it requires that the presentence report include information that will be helpful in evaluating the restitution needs of the victim and the ability of the defendant to make restitution, including information describing programs which would facilitate his ability to make restitution.

Two, it makes it an offense to attempt to retaliate against victims and witnesses, an omission which I think was merely an oversight in S. 2420.

Three, my bill would impose an additional penalty for obstruction of justice offenses committed while a defendant is on release pending trial, sentencing, or appeal. This is similar to a provision in S. 1554 as it was reported by the full Senate Judiciary Committee and should provide an additional deterrent to this particularly reprehensible type of bail crime.

Four, in order to issue a restraint against victim or witness tampering, the court must consider whether the prospect of injury to the victim or witness in the absence of a restraint outweighs any injury that such relief may inflict on the defendant's ability to conduct his defense. The court must also consider whether other means of protecting the victim or witnesses would be inadequate. Because these situations are generally emergencies, I do not believe that the courts should have to make specific findings with respect to these concerns prior to granting relief. However, I believe that the court, at a minimum, should be required to give some consideration to these concerns in exercising its discretion.

Five, it would bring within the tampering and retaliation offenses conduct aimed at hindering an individual from communicating information to a law enforcement officer about parole, probation, or release violations. I believe that individuals who report this kind of information should be protected like those who report information about the commission of an offense.

Mr. Chairman, because of the controversy that victims' compensation has generated in the House in prior Congresses in terms of budget concerns, my package at this point does not include a Federal victims' compensation program. However, as a strong supporter of such programs in the past, I am currently studying various funding alternatives in this area in the hope that any budgetary obstacles to the implementation of a Federal program might be removed.

In this connection, I want to commend the Senator from Pennsylvania for his proposal which would appear to solve our funding dilemma in an equitable manner. On the other hand, I would like to note my strong opposition to various proposals which would finance victims' compensation programs from the excise tax on handguns and other weapons. Such proposals not only introduce into the debate an extraneous and unnecessarily controversial element, but they are based on a thoroughly unfair premise—that law-abiding citizens who pay these taxes are responsible for the criminal misuse of firearms.

Mr. Chairman, again I commend you and your colleague from Pennsylvania on your stalwart efforts in this area. I look forward to continuing our close alliance and to sending legislation to the President's desk by the end of this Congress.

I would like to ask permission, Mr. Chairman, to submit at a later date a copy of the printed bill which I am introducing today and a section-by-section analysis to be included in the subcommittee record.

Senator LAXALT. Without objection, it is so ordered.

[A copy of H.R. 6508 and a section-by-section analysis submitted by Representative Fish follows:]

I

97TH CONGRESS
2D SESSION

H. R. 6508

To improve the protection of, and assistance to, victims of Federal offenses and witnesses in Federal criminal cases.

IN THE HOUSE OF REPRESENTATIVES

MAY 27, 1982

Mr. FISH introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To improve the protection of, and assistance to, victims of Federal offenses and witnesses in Federal criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Omnibus Victim-Witness Protection and Assistance Act of 1982".

VICTIM IMPACT AND RESTITUTION STATEMENT

SEC. 2. Paragraph (2) of rule 32(c) of the Federal Rules of Criminal Procedure is amended to read as follows:

"(2) REPORT.—The report concerning the presentence investigation shall contain—

"(A) any prior criminal record of the defendant, and;

"(B) any other information which the court may require in sentencing, including—

"(i) a statement of the circumstances surrounding the commission of the offense and circumstances affecting the defendant's behavior;

"(ii) the nature and extent of nonprison programs and resources available and the applicability of such programs and resources to the defendant, including the effect of such programs on the defendant's ability to make restitution to any victim;

"(iii) an assessment of any harm done to, or loss suffered by, any victim, including the financial, social, psychological, and medical impact of the offense; and

"(iv) in the case of an offense for which a monetary sanction may be imposed, a statement of the financial resources of the defendant, the financial needs of the defendant and the defendant's dependents, the restitution needs of the victim, and any gain derived from, or loss caused by the criminal conduct of the defendant.”.

PROTECTION OF VICTIMS AND WITNESSES FROM INTIMIDATION

SEC. 3. (a) Chapter 73 of title 18 of the United States Code is amended by adding at the end the following new sections:

“§ 1512. Tampering with a witness, victim, or an informant

“(a) Whoever knowingly uses physical force, threat, intimidation, or fraud with intent to—

“(1) influence the testimony of another person in an official proceeding; or

“(2) cause or induce another person to—

“(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

“(B) alter, destroy, mutilate, or conceal an object with intent to impair such object’s integrity or availability for use in an official proceeding;

“(C) evade legal process summoning that other person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

"(3) hinder, delay, or prevent the communication to a law enforcement officer of information relating to a Federal offense or possible Federal offense or a violation of conditions on probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than five years, or both.

"(b) In a prosecution for an offense under subsection (a)(1) of this section, it is an affirmative defense, as to which the defendant has the burden of persuasion, that the threat or intimidation consisted solely of lawful conduct and that the defendant's sole intention was to compel or induce the other person to testify truthfully.

"(c) It is not a defense to a prosecution under this section that—

"(1) an official proceeding was not pending or about to be instituted; or

"(2) the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence.

"§ 1513. Retaliating against a witness, victim, or an informant

"Whoever—

"(1) knowingly engages in conduct and thereby intentionally causes bodily injury to another person or damages the property of another person with intent to punish any person for—

"(A) the attendance of a witness or party at an official proceeding, or any testimony given, or any record, document, or other object produced, by a witness in an official proceeding; or

"(B) any information relating to a Federal offense, a possible Federal offense or a violation of conditions on probation, parole or release pending judicial proceedings given by a person to a law enforcement officer; or

"(2) unlawfully and knowingly engages in any conduct and thereby intentionally causes economic loss to another person, or injury to another person's business or profession, with intent to punish such other person for any matter described in subparagraph (A) or (B) of paragraph (1) of this section;

or attempts to do so, shall be fined not more than $250,000 or imprisoned not more than five years, or both, in the case described in paragraph (1) of this section, and fined not more than $250,000 or imprisoned not more than two years, or both, in any other case.

"§ 1514. Definitions for certain provisions

"As used in sections 1512 and 1513 of this title—

"(1) the term 'official proceeding' means—

"(A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, or a Federal grand jury;

"(B) a proceeding before the Congress; or

"(C) a proceeding before a Federal Government agency which is authorized by law;

"(2) the term 'physical force' means physical action against another, and includes confinement;

"(3) the term 'fraud' means—

"(A) knowingly making a false statement;

"(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

"(C) with intent to mislead knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

"(D) with intent to mislead knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

"(E) knowingly using a trick, scheme, or device with intent to mislead; and

"(4) the term 'law enforcement officer' means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant (including an elected official, judge, or juror)—

"(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

"(B) serving as a probation officer under this title.".

(b) Section 3146(a) of chapter 207 of title 18, United States Code, is amended in the matter preceding paragraph (1) by—

(1) inserting the following between "officer," and "unless": "subject to the condition that such person not commit an offense under chapter 73 of this title,"; and

(2) inserting the following between "impose" and "the": "a condition of release that such person not commit an offense under chapter 73 of this title and impose".

(c) Chapter 73 of title 18, United States Code, is amended by adding at the end thereof the following:

"§ 1515. Penalty for an offense committed while on release pending judicial proceedings

"(a) A person convicted of an offense under this chapter which is committed while released under chapter 207 of this title shall be sentenced, in addition to the sentence prescribed for such offense, to—

"(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or

"(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

"(b) A term of imprisonment imposed under this section shall be consecutive to any sentence of imprisonment for the offense with respect to which release was ordered.".

"1512. Tampering with a witness, victim, or an informant.
"1513. Retaliating against a witness, victim, or an informant.
"1514. Definitions for certain provisions.
"1515. Penalty for an offense committed while on release pending judicial proceedings."

SEC. 4. (a) Title 18 of the United States Code is amended by adding after chapter 223 the following new chapter:

"CHAPTER 224—PROTECTION OF WITNESSES AND VICTIMS

"Sec.
"3521. Witness relocation and protection.
"3522. Reimbursement of expenses.
"3523. Civil action to restrain witness or victim intimidation.

"§ 3521. Witness relocation and protection

"(a) The Attorney General may provide for the relocation or protection of a witness, or a potential witness, for the government in an official proceeding if the Attorney General determines that—

"(1) an offense described in sections 1503, 1505 or 1513 of this title, or

"(2) a State or local offense which involves a threat to injury of, or intimidation of such a witness or potential witness or a crime of violence directed at such a witness, or potential witness

is likely to be committed. The Attorney General may also provide for the relocation or protection of any member of the immediate family of, or a person closely associated with, such witness or potential witness if such family member or such person may also be endangered.

"(b) In connection with the relocation or protection of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General may take any action he determines to be necessary to protect such person from bodily injury, and otherwise to assure his health, safety, and welfare, for as long as, in the judgment of the Attorney General, such danger exists. The Attorney General may—

"(1) provide suitable official documents to enable a person relocated to establish a new identity;

"(2) provide housing for the person relocated or protected;

"(3) provide for the transportation of household furniture and other personal property to the new residence of the person relocated;

"(4) provide a tax free subsistence payment, in a sum established in regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

"(5) assist the person relocated in obtaining employment; and

"(6) refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure.

"(c) Notwithstanding the provisions of subsection (b)(6) of this section, if a person relocated under this section is named as a defendant in a civil cause of action, arising prior to such person's relocation, for damages resulting from bodily injury, property damage, or injury to business, process in the civil proceeding may be served upon the Attorney General. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person relocated at his last known address. If a judgment in such an action is entered against the person relocated, the Attorney General shall determine whether such person has made reasonable efforts to comply with the provisions of that judgment. The Attorney General shall take affirmative steps to urge the person relocated to comply with any judgment rendered. If the Attorney General determines that such person has not made reasonable efforts to comply with the provisions of the judgment, the Attorney General may, in his discretion, after weighing the danger to the person relocated, disclose the identity and location of such person to the plaintiff entitled to recovery pursuant to the judgment. Any such disclosure shall be made upon the express condition that further disclosure by the plaintiff of such identity or location may be made only if essential to the plaintiff's efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery. Any such disclosure or nondisclosure by the Attorney General shall not subject the Government to liability in any action based upon the consequences of such disclosure or nondisclosure.

"§ 3522. Reimbursement of expenses

"The provision of transportation, housing, subsistence, or other assistance to a person under section 3523 of this title may be conditioned by the Attorney General upon reimbursement of expenses in whole or in part to the United States by a State or local government.

"§ 3523. Civil action to restrain witness or victim intimidation

"(a) Upon motion of the attorney for the Government, a district court of the United States in which a criminal proceeding has been, or may be instituted, may issue an order under this section to prevent and restrain an offense involving a witness or a victim under section 1503, 1505 or 1512 of this title.

"(b) After a hearing, and—

"(1) upon finding that an offense under section 1503, 1505, or 1512 of this title involving a witness or a victim has occurred or, in the absence of an order under this section, is likely to occur, and

"(2) after considering—

"(A) whether greater injury will be inflicted upon the witness or victim by the failure to issue an order under this section than will be inflicted upon the ability of defendant to conduct his defense by the issuance of such order; and

"(B) whether other means of protection are inadequate to prevent an offense involving a witness or victim under section 1503, 1505, or 1512 of this title.

the court may issue an order under subsection (c) of this section.

"(c) As authorized by subsection (b) of this section, the court may order that a defendant, a witness, or other person connected with a criminal case, or an individual in the courtroom—

"(1) refrain from engaging in conduct in violation of section 1503, 1505, or 1512 of this title.

"(2) maintain a prescribed distance from a specified victim or witness; and

"(3) refrain from communicating with a specified victim or witness except under such conditions as the court may impose.

"(d) The court shall make a determination on any motion filed under this section as soon as practicable.

"(e) As used in this section—

"(1) 'witness' means an individual—

"(A) having knowledge of the existence or nonexistence of facts relating to an offense;

"(B) whose declaration under oath is received in evidence for any purpose;

"(C) who has reported an offense to a judge, a law enforcement officer, or probation officer, or an officer of a correctional facility; or

"(D) who has been served with a subpena, including a grand jury subpena, issued under the authority of a court of the United States; and

"(2) 'victim' means an individual against whom an offense has been or is being committed.".

(b) The table of chapters for part II of title 18, United States Code, is amended by adding after the item for chapter 223 the following new item:

"224. Protection of witness .... 3521".

(c) The Organized Crime Control Act of 1970 (84 Stat. 933) is amended by striking title V.

(d) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of chapter 224 of title 18, United States Code, as added by this Act.

RESTITUTION

SEC. 5. (a) Chapter 227 of title 18, United States Code, is amended by adding at the end the following:

"§ 3579. Sentence of restitution

"(a) A defendant found guilty of an offense under this title may be sentenced, in addition to any other penalty provided under this title, to—

"(1) make restitution in the case of an offense resulting in bodily injury or death, by paying necessary medical expenses and, if applicable, any necessary funeral and burial expenses attributable to such injury or death;

"(2) in the case of an offense resulting in loss, damage, or destruction of property, make restitution—

"(A) by returning such property; and

"(B) if return of such property under subparagraph (A) of this paragraph is impossible or impractical, by paying an amount equal to the greater of the value of the property on the date of the loss, damage, or destruction, or the value of the property on the date of sentencing, less the value (as of the date of sentencing) of any part of the property returned under subparagraph (A) of this paragraph; and

"(3) make such other restitution as the court deems appropriate.

"(b) The court shall limit a sentence of restitution under this section to the extent necessary to avoid unduly complicating or prolonging the sentencing process.

"(c)(1) The court shall not impose a sentence of restitution with respect to a victim who is a party to any judgment, settlement, or agreement under which such victim has received or is to receive compensation for the injury, loss, damage, or destruction caused by the offense for which the defendant is convicted.

"(2) Any amount paid to a victim under a sentence of restitution shall be set off against any amount later recovered as compensatory damages by such victim in any civil proceeding.

"(d) The court may require, as a condition of a sentence of restitution, that the defendant make restitution within a specified period or in specified installments, but such period shall not be greater than the maximum term of probation or imprisonment for the offense, whichever is greater. If not otherwise provided by the court under this subsection, restitution shall be made immediately.

"(e) If a defendant is placed on probation or paroled pursuant to this title, any restitution ordered under this section shall be a condition of such parole or probation. Failure to comply with an order of restitution shall be grounds for the revocation of parole or probation.

"(f) A sentence of restitution may be enforced by the United States in the same manner as a judgment in a civil action and shall have priority over any Federal lien.".

(b) The analysis for chapter 227 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"3579. Sentence of restitution.".

(c) Within six months after the date of enactment of this title, the Attorney General shall report to Congress concerning any laws necessary to ensure that all victims of crime are justly compensated in those cases where restitution is not possible. The Attorney General shall consider funding methods such as imposing additional fines on all individuals convicted of Federal crimes.

FEDERAL ACCOUNTABILITY FOR ESCAPE OR RELEASE OF A FEDERAL PRISONER

SEC. 6. (a) Section 1346(b) of title 28, United States Code, is amended by inserting "(1)" immediately after "(b)".

(b) Section 1346(b) of title 28, United States Code, is amended by adding at the end thereof the following:

"(2)(A) Subject to the provisions of chapter 171 of this title and subparagraph (B) of this paragraph, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of any civil action on a claim against the United States for damages, accruing on and after the date of enactment of this paragraph, for injury or loss of property, or personal injury or death directly caused by any dangerous offender charged with or convicted of a Federal offense who is released from, or who escapes from, lawful custody of an employee of, or any person acting as the lawful agent of, the United States as a result of the gross negligence of such employee or person.

"(B) For the purposes of this paragraph—

"(i) 'gross negligence' includes the failure to warn reasonably forseeable victims that the person charged with or convicted of the offense was released or has escaped, or the violation of a statute, regulation, or court order which results in such release or escape; and

"(ii) 'dangerous offender' means a person charged with or convicted of a crime involving the use, attempted use, or threatened use of violence against the person or property of another.".

FEDERAL GUIDELINES FOR FAIR TREATMENT OF CRIME VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM

SEC. 7. (a) Within one hundred and eighty days after the date of enactment of this Act, the Attorney General and the heads of other Federal law enforcement agencies shall develop and implement guidelines for the Department of Justice and such other agencies for the fair treatment of crime victims and witnesses in criminal cases. In preparing the guidelines, the Attorney General shall consider, and the heads of other agencies shall consider to the extent relevant, the following objectives:

(1) Law enforcement personnel should ensure that victims of crime routinely receive emergency social and medical services as soon as possible and are given information on—

(A) the availability to the victim of any crime victim compensation or treatment programs;

(B) the crime victim's role in the criminal justice process, including what a crime victim can expect from the criminal justice system as well as what the criminal justice system expects from the crime victim;

(C) key points in the criminal justice process at which a crime victim might want to request information as to the status of such victim's particular case and suggestions on how best to request this information; and

(D) the ability of law enforcement officers to protect victims and witnesses from intimidation.

(2) Each victim and witness who has been scheduled to attend criminal justice proceedings should be notified as soon as possible of any scheduling changes which will affect such victim's or witness' appearances or be placed on "on call" or telephone alert.

(3) Victims and witnesses of serious crimes should be given the opportunity to request advance notification of important criminal justice proceedings. Victims and witnesses who provide the appropriate official with a current address and telephone number should receive prompt advance notification of all judicial proceedings relating to their case, including—

(A) the arrest or initial appearance before a judicial officer of the accused;

(B) the initial bond decision relating to the accused; and

(C) the disposition of the case (including trial, sentencing, and release).

(4) When the victim of a serious crime has provided a current address and telephone number, the attorney for the Government should obtain the nonbinding views of the victim, or in the case of a minor child or a homicide, the victim's family, before making a decision as to the prosecution of the offense, including a decision regarding—

(A) dismissal;

(B) release pending judicial proceedings;

(C) plea negotiations; and

(D) pretrial diversion program.

(5) Victims and witnesses should be provided with a secure waiting area during court proceedings that is separate from all but prosecution witnesses.

(6) Law enforcement agencies and attorneys for the Government should promptly return a victim's property held for evidentiary purposes unless there is a compelling law enforcement reason for retaining such property.

(7) Law enforcement agencies and attorneys for the Government should offer to assist victims and witnesses in informing employers of the need for victim and witness cooperation in the prosecution of the case which may necessitate absence from work. If, as a direct result of a crime or of cooperation with law enforcement officials, a victim or witness is subjected to serious financial strain, a law enforcement official should offer to contact creditors to explain the circumstances.

(8) The directors of Federal law enforcement training facilities should ensure that victim assistance training is offered to law enforcement officials so that victims are assisted promptly and properly after the commission of a crime and throughout the duration of the criminal justice proceedings.

(9) Law enforcement officials should take steps to assure that other important means of assisting victims and witnesses, such as the transportation, parking, and translator services in court, are available to the extent feasible.

(b) Nothing in this section shall be construed as creating a cause of action against the United States.

PROFIT BY A CRIMINAL FROM PUBLICITY RELATING TO CRIMINAL CONDUCT

SEC. 8. Within one year after the date of enactment of this title, the Attorney General shall report to Congress regarding the desirability of legislation controlling the disposition of the proceeds that a person convicted of a Federal felony may derive from the sale of the recollections, thoughts, and feelings of such person with regard to that felony.

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ANALYSIS OF THE
OMNIBUS VICTIM-WITNESS PROTECTION AND
ASSISTANCE ACT OF 1982
INTRODUCED BY HON. HAMILTON FISH, JR.

The Omnibus Victim-Witness Protection and Assistance Act of 1982 provides for the protection of, and assistance to, victims and witnesses in the federal criminal justice system by making the following changes in existing law:

A. Victim Impact and Restitution Statement. Section 2 of the bill amends Rule 32(c)(2) of the Federal Rules of Criminal Procedure to require that the presentence investigation report provided to the judge include, in addition to information required under current law, (1)information relating to nonprison programs and resources available to the defendant and their effect on his ability to make restitution to the victim, (2) an assessment of injury or loss suffered by any victim, including the financial, social, psychological and medical impact of the offense, and (3) information relating to the defendant's ability to make restitution and any gain or loss caused by his conduct.

B. Victim-Witness Intimidation and Retaliation. Section 3(a) of the bill adds a new Section 1512 to Chapter 73 of Title 18 to impose criminal penalties on a person who knowingly uses physical force, threat or fraud with intent to (1) influence testimony in an official proceeding, or (2) cause another to withhold testimony or evidence, destroy or conceal evidence, or evade a summons to appear or produce evidence in an official proceeding, or (3) hinder another from advising a law enforcement officer about a possible federal offense or violation of conditions on probation, parole or release pending judicial proceedings. The defendant may raise an affirmative defense to a prosecution involving the influencing of testimony that the threat involved lawful conduct solely intended to induce truthful testimony. The facts that the official proceeding was not pending or imminent and that the evidence involved would have been inadmissible are precluded as defenses. The penalties for victim or witness tampering are five years' imprisonment and/or $250,000.

Section 3(b) of the bill adds a new Section 1513 to Chapter 73 of Title 18 to impose criminal penalties on a person who (1) by his

KNOWING CONDUCT INTENTIONALLY CAUSES BODILY OR PROPERTY INJURY TO ANOTHER WITH AN INTENT TO PUNISH THAT PERSON FOR ATTENDING OR PROVIDING EVIDENCE IN AN OFFICIAL PROCEEDING OR FOR PROVIDING INFORMATION TO A LAW ENFORCEMENT OFFICER RELATING TO A FEDERAL OFFENSE OR A PAROLE, PROBATION OR RELEASE VIOLATION, OR (2) BY HIS KNOWING AND UNLAWFUL ACT INTENTIONALLY CAUSES ECONOMIC LOSS TO ANOTHER WITH A SIMILAR INTENT TO PUNISH. ATTEMPTS TO COMMIT THE OFFENSE ARE ALSO PUNISHABLE. THE PENALTIES FOR THE OFFENSE ARE FIVE YEARS' IMPRISONMENT FOR AN OFFENSE INVOLVING BODILY OR PROPERTY INJURY AND TWO YEARS' IMPRISONMENT WITH RESPECT TO ECONOMIC LOSS, AND/OR $250,000.

FOR PURPOSES OF BOTH OFFENSES, AN "OFFICIAL PROCEEDING" INCLUDES COURT, CONGRESSIONAL AND AGENCY PROCEEDINGS. A "LAW ENFORCEMENT OFFICER" INCLUDES ANY FEDERAL EMPLOYEE (INCLUDING AN ELECTED OFFICIAL, JUDGE OR JUROR) AUTHORIZED TO PREVENT, INVESTIGATE OR PROSECUTE OFFENSES OR A FEDERAL PROBATION OFFICER.

C. OBSTRUCTING JUSTICE WHILE ON RELEASE. SECTION 3(C) OF THE BILL MAKES TWO CHANGES IN CONNECTION WITH RELEASE PENDING JUDICIAL PROCEEDINGS. FIRST, IT REQUIRES THE JUDICIAL OFFICER TO IMPOSE AS A CONDITION OF RELEASE THAT THE DEFENDANT REFRAIN FROM COMMITTING ANY CHAPTER 73 (OBSTRUCTION OF JUSTICE) OFFENSE. SECOND, IT IMPOSES ADDITIONAL AND CONSECUTIVE PENALTIES FOR THE COMMISSION OF A CHAPTER 73 (OBSTRUCTION OF JUSTICE) OFFENSE WHILE ON RELEASE PENDING JUDICIAL PROCEEDINGS. THE PENALTY IS TWO TO TEN YEARS WHERE THE OFFENSE IS A FELONY AND NINETY DAYS TO ONE YEAR WHERE THE OFFENSE IS A MISDEMEANOR.

D. WITNESS RELOCATION AND PROTECTION. SECTION 4 OF THE BILL TRANSFERS TITLE V OF THE ORGANIZED CRIME CONTROL ACT OF 1970 (P.L. 91-452; 84 STAT. 933), WHICH ESTABLISHED THE FEDERAL WITNESS RELOCATION PROGRAM, TO A NEW CHAPTER 224 IN TITLE 18 OF THE UNITED STATES CODE. 18 U.S.C. 3521(A) WOULD AUTHORIZE THE ATTORNEY GENERAL TO PROVIDE FOR THE RELOCATION OR PROTECTION OF A WITNESS OR POTENTIAL WITNESS FOR THE GOVERNMENT WHERE A FEDERAL, STATE OR LOCAL WITNESS INTIMIDATION OFFENSE IS LIKELY TO BE COMMITTED. A MEMBER OF THE IMMEDIATE FAMILY OF, OR PERSON CLOSELY ASSOCIATED WITH, SUCH A WITNESS MAY ALSO BE RELOCATED OR PROTECTED IF ENDANGERED.

18 U.S.C. 3521(B) WOULD PERMIT SUCH PROTECTION OR RELOCATION TO LAST FOR AS LONG AS THE ATTORNEY GENERAL DETERMINES THAT DANGER EXISTS AND TO INVOLVE ANY MEASURE DETERMINED BY THE ATTORNEY GENERAL TO BE NECESSARY, INCLUDING--

1. PROVIDING NEW IDENTITY DOCUMENTS;
2. PROVIDING NEW HOUSING AND MOVING EXPENSES;
3. PROVIDING A TAX-FREE SUBSISTENCE PAYMENT;
4. ASSISTANCE IN OBTAINING EMPLOYMENT; AND
5. REFUSING TO DISCLOSE THE IDENTITY OR LOCATION OF THE RELOCATED PERSON AFTER CONSIDERING POTENTIAL DANGERS OF DISCLOSURE TO SUCH PERSON AND THE PROGRAM AND THE BENEFITS ACCRUING FROM SUCH EXPOSURE./

18 U.S.C. 3521(c) WOULD PERMIT THE SERVICE OF PROCESS IN CERTAIN CIVIL CAUSES OF ACTION ARISING PRIOR TO RELOCATION TO BE SERVED UPON THE ATTORNEY GENERAL WHO MUST MAKE REASONABLE EFFORTS TO SERVE SUCH PROCESS UPON THE RELOCATED PERSON. THE ATTORNEY GENERAL IS DIRECTED TO URGE SUCH PERSON TO COMPLY WITH ANY JUDGMENT RENDERED AGAINST HIM AND MAY, AFTER CONSIDERING THE DANGER POSED, DISCLOSE SUCH PERSON'S IDENTITY UPON THE CONDITION THAT FURTHER DISCLOSURE ONLY BE MADE WHERE NECESSARY TO THE PLAINTIFF'S RECOVERY. NO CAUSE OF ACTION LIES AGAINST THE UNITED STATES FOR DAMAGES RESULTING FROM ANY SUCH DISCLOSURE OR NONDISCLOSURE.

18 U.S.C. 3222 WOULD AUTHORIZE THE ATTORNEY GENERAL TO CONDITION ASSISTANCE PROVIDED UPON REIMBURSEMENT FROM A STATE OR LOCAL GOVERNMENT.

E. RESTRAINT ON VICTIM/WITNESS INTIMIDATION. 18 U.S.C. 3523 WOULD AUTHORIZE A DISTRICT COURT OF THE UNITED STATES IN WHICH A CRIMINAL PROCEEDING HAS BEEN, OR MAY BE, INSTITUTED TO ISSUE AN ORDER TO RESTRAIN CERTAIN FEDERAL OFFENSES INVOLVING VICTIMS OR WITNESSES. THE COURT MAY ORDER A DEFENDANT OR CERTAIN OTHER PERSONS TO REFRAIN FROM COMMITTING SUCH AN OFFENSE, MAINTAIN A CERTAIN DISTANCE FROM THE VICTIM OR WITNESS AND REFRAIN FROM COMMUNICATING WITH SUCH VICTIM OR WITNESS EXCEPT UNDER SPECIFIED CIRCUMSTANCES, AFTER:

1. HOLDING A HEARING;
2. FINDING THAT SUCH AN OFFENSE HAS OCCURRED OR IS LIKELY TO OCCUR ABSENT SUCH PROTECTION; AND
3. CONSIDERING (A) WHETHER POTENTIAL INJURY TO THE VICTIM OR WITNESS IN THE ABSENCE OF AN ORDER WILL BE GREATER THAN INJURY TO THE DEFENDANT'S ABILITY TO CONDUCT HIS DEFENSE UNDER THE RESTRAINT AND (B) WHETHER OTHER MEANS OF PROTECTION ARE INADEQUATE.

F. RESTITUTION. SECTION 5 OF THE BILL ADDS A NEW SECTION 3579

TO TITLE 18 OF THE UNITED STATES CODE WHICH AUTHORIZES THE COURT TO SENTENCE A DEFENDANT FOUND GUILTY OF CERTAIN OFFENSES UNDER TITLE 18 TO MAKE RESTITUTION TO THE VICTIM OF THAT OFFENSE IN ADDITION TO ANY OTHER AUTHORIZED SENTENCE. UPON CONVICTION OF AN OFFENSE RESULTING IN BODILY INJURY OR DEATH, THE DEFENDANT MAY BE REQUIRED TO PAY NECESSARY MEDICAL, FUNERAL AND BURIAL EXPENSES. WHERE THE OFFENSE INVOLVES PROPERTY LOSS OR DAMAGE, THE DEFENDANT MAY BE REQUIRED TO RETURN THE PROPERTY OR TO PAY THE GREATER OF THE VALUE OF THE PROPERTY ON EITHER THE DATE OF DAMAGE OR SENTENCING, LESS THE VALUE OF ANY RETURNED PROPERTY. THE COURT MAY ALSO ORDER THE DEFENDANT TO MAKE OTHER RESTITUTION AS IT DEEMS APPROPRIATE.

PROPOSED 18 U.S.C. 3579(B) REQUIRES THE COURT TO LIMIT RESTITUTION TO THE EXTENT NECESSARY TO AVOID UNDULY COMPLICATING OR PROLONGING THE SENTENCING PROCESS.

PROPOSED 18 U.S.C. 3579(C) ESTABLISHES CERTAIN RULES TO INSURE THAT RESTITUTION WILL NOT DUPLICATE OTHER COMPENSATION RECEIVED BY THE VICTIM. FIRST, THE COURT MAY NOT IMPOSE A SENTENCE OF RESTITUTION WITH RESPECT TO ANY JUDGMENT OR SETTLEMENT UNDER WHICH THE VICTIM HAS OR WILL RECEIVE COMPENSATION. SECOND, ANY RESTITUTION RECEIVED MUST BE SET-OFF AGAINST AMOUNTS RECEIVED AS COMPENSATORY DAMAGES IN A SUBSEQUENT CIVIL SUIT.

UNDER PROPOSED 18 U.S.C. 3579(D), RESTITUTION IS TO BE MADE IMMEDIATELY UNLESS THE COURT REQUIRES THAT PAYMENT BE MADE WITHIN A SPECIFIED PERIOD OR IN SPECIFIED INSTALLMENTS. PROPOSED 18 U.S.C. 3579(E) REQUIRES AS A MANDATORY CONDITION OF PAROLE OR PROBATION THAT THE DEFENDANT MAKE ANY RESTITUTION TO WHICH HE HAS BEEN SENTENCED. FAILURE TO DO SO IS GROUNDS FOR REVOCATION. PROPOSED 18 U.S.C. 3579(F) PERMITS A SENTENCE OF RESTITUTION TO BE ENFORCED BY THE UNITED STATES LIKE A CIVIL JUDGMENT AND GIVES A RESTITUTION SENTENCE PRIORITY OVER ANY FEDERAL LIEN.

G. VICTIM COMPENSATION. SECTION 5(C) OF THE BILL REQUIRES THE ATTORNEY GENERAL, WITHIN SIX MONTHS AFTER ENACTMENT, TO REPORT TO CONGRESS CONCERNING ANY NEEDED LEGISLATION TO JUSTLY COMPENSATE VICTIMS OF CRIME WHERE RESTITUTION IS INSUFFICIENT. SUCH SUPPORT MUST SPECIFICALLY ADDRESS THE PROPOSAL TO FUND SUCH COMPENSATION BY LEVYING ADDITIONAL FINES ON ALL INDIVIDUALS CONVICTED OF FEDERAL CRIMES.

H. SUITS AGAINST THE UNITED STATES FOR GROSSLY NEGLIGENT RELEASE OF DANGEROUS OFFENDERS. SECTION 6 OF THE BILL AMENDS 28 U.S.C. 1346 TO GRANT THE FEDERAL DISTRICT COURTS EXCLUSIVE JURISDICTION

OVER ACTIONS AGAINST THE UNITED STATES FOR DAMAGES RESULTING FROM PROPERTY OR BODILY INJURY CAUSED BY A DANGEROUS FEDERAL OFFENDER WHO HAS ESCAPED OR BEEN RELEASED FROM THE CUSTODY OF THE UNITED STATES BECAUSE OF THE GROSS NEGLIGENCE OF AN EMPLOYEE OR AGENT OF THE UNITED STATES. THE FAILURE TO WARN REASONABLY FORESEEABLE VICTIMS OF THE OFFENDER'S RELEASE OR ESCAPE WOULD CONSTITUTE "GROSS NEGLIGENCE."

I. GUIDELINES FOR THE FAIR TREATMENT OF CRIME VICTIMS AND WITNESSES. SECTION 7(A) OF THE BILL REQUIRES THE ATTORNEY GENERAL (AND, TO THE EXTENT APPLICABLE, HEADS OF OTHER FEDERAL LAW ENFORCEMENT AGENCIES) TO IMPLEMENT GUIDELINES FOR THE FAIR TREATMENT OF VICTIMS AND WITNESSES IN FEDERAL CRIMINAL CASES. SECTION 7(B) OF THE BILL MAKES IT CLEAR THAT THIS REQUIREMENT IS NOT INTENDED TO CREATE ANY CAUSE OF ACTION AGAINST THE UNITED STATES.

IN ESTABLISHING GUIDELINES, THE ATTORNEY GENERAL AND OTHER LAW ENFORCEMENT AGENCY HEADS SHOULD CONSIDER THE FOLLOWING OBJECTIVES:

1. ENSURING THAT CRIME VICTIMS RECEIVE PROMPT EMERGENCY SERVICES AND INFORMATION ON AVAILABLE COMPENSATION PROGRAMS, THE VICTIM'S ROLE IN THE CRIMINAL JUSTICE PROCESS AND PROTECTION AGAINST INTIMIDATION.
2. NOTIFYING VICTIMS AND WITNESSES OF SCHEDULING CHANGES WHICH WILL AFFECT THEIR SCHEDULED COURT APPEARANCES.
3. GIVING VICTIMS AND WITNESSES THE OPPORTUNITY TO REQUEST ADVANCE NOTIFICATION OF JUDICIAL PROCEEDINGS RELATING TO THEIR CASES, INCLUDING THE ACCUSED'S ARREST, BOND DECISION, AND DISPOSITION OF THE CASE.
4. OBTAINING FROM INTERESTED VICTIMS THEIR NON-BINDING VIEWS AS TO CERTAIN PROSECUTORIAL DECISIONS RELATING TO PLEA NEGOTIATIONS, RELEASE PENDING JUDICIAL PROCEEDINGS AND OTHER MATTERS.
5. PROVIDING VICTIMS AND WITNESSES WITH A WAITING AREA DURING COURT PROCEEDINGSTHAT IS SECURE AND SEPARATE FROM ALL BUT PROSECUTION WITNESSES.
6. PROMPTLY RETURNING A VICTIM'S PROPERTY HELD AS EVIDENCE IN THE ABSENCE OF A COMPELLING LAW ENFORCEMENT REASON FOR RETENTION.
7. OFFERING TO ASSIST VICTIMS AND WITNESSES IN INFORMING EMPLOYERS ABOUT COOPERATION WHICH MAY NECESSITATE ABSENCE FROM WORK AND IN INFORMING CREDITORS ABOUT ANY SERIOUS FINANCIAL STRAIN RESULTING FROM THE CRIME.
8. ENSURING THAT VICTIM ASSISTANCE TRAINING IS OFFERED TO LAW ENFORCEMENT OFFICIALS.
9. ENSURING THAT OTHER MEANS OF ASSISTANCE, SUCH AS TRANSPORTATION AND TRANSLATOR SERVICES, ARE AVAILABLE TO THE EXTENT FEASIBLE.

Senator LAXALT. Congressman, we thank you for your statement, and we look forward to your cooperation. We will turn to your proposed suggestions. We will attempt to reconcile any differences between the two bills at the subcommittee level before we go to the full committee. If you can help us on the other end, we will do the best we can here to get the job done.

Senator Heinz?

Senator HEINZ. I would like to agree, Mr. Chairman. Congressman Fish has made some very good suggestions. It is my first impression that they are outstanding and should be incorporated. I do not think they are at all inconsistent with anything we are trying to do. I cannot prejudge the deliberations of the Judiciary Committee. I don't even serve on it, but I am honored to be a sit-in today.

But I do think that you have made some excellent suggestions and I commend you for your immense amount of work in this area. It is a pleasure to see you again. I do not see you as frequently as I did when I served in the other body.

Congressman FISH. Thank you.

Thank you, Mr. Chairman.

Senator LAXALT. In the subcommittee's efforts to find hearing witnesses representing a cross section of the victims community, we were able to find many individuals who had been intimidated, but asking them to appear in a public hearing was understandably asking the impossible. The true extent of the witness intimidation problem is not known. Every study verifies the pervasiveness of the problem.

I believe the provisions of this bill, drafted by the American Bar Association, will go a long way toward correcting this insidious offense. No one has been convicted of an offense that was not reported. The victimized must learn the law is being changed to protect them. It is up to the prosecutors and law enforcement personnel to accomplish this.

Senator Heinz, will you introduce the next panel?

Senator HEINZ. It is not easy for a victim of a criminal act to come forward and relive the experience, and yet the witnesses we have today, Virginia Montgomery and Geraldine X, have volunteered to share their experiences with us, and for this we are grateful.

Because of your courage and willingness to speak, we hope to be able to change our criminal justice system so that other victims will not have to suffer the injustices that you were exposed to.

Accompanying our panel of victim witnesses is Dr. Marlene Young, executive director for the National Organization for Victim Assistance.

This organization, NOVA, has labored many years at both the Federal and State levels to redirect criminal justice and law enforcement resources so that they respond to the needs of victims. Their well-respected work on victims may be found in almost every section of the bill, and moreover, their efforts have resulted in passage of victim legislation more comprehensive than anything we have in the Federal system.

So I thank our witnesses, Mrs. Montgomery, Geraldine X, and Dr. Young, for being here. We look forward to their testimony.

Senator LAXALT. Geraldine X, will you proceed to testify?

STATEMENTS OF GERALDINE X, MONTGOMERY COUNTY, MD.; VIRGINIA MONTGOMERY, BOWIE, MD.; AND MARLENE A. YOUNG, PRESIDENT, NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE (NOVA)

Mrs. X. Good morning. I am happy to be here. I am grateful for the opportunity, although I am nervous.

On August 31, 1978, while serving as a children's librarian for Montgomery County public library system, I reported to one of our library branches to perform the children's story time there. I was greeted by an armed assailant. I was kidnaped, raped, and, after 3 hours of being terrorized, robbed at gunpoint of everything in our family's bank account.

During the 3-hour ordeal, the assailant threatened to kill me if I said one word. He showed me that his gun was loaded. He displayed three bullets.

I told the bank teller, using sign language, "Help, police," and showed the sign for a gun with my hand.

When he realized that the police were in pursuit, that I had been the one, that I had been able to notify someone and get help, he yelled at me and in some terrible language and told me that he would get me for having called the police.

He asked me whether my children were at home, and were they alone? It happened we live quite near the Montgomery County detention center where he remained for the year it took between the assault and the actual trial.

I have found in my experience that many people can at least speculate how horrible it is to be raped, kidnaped, and robbed at gunpoint, how really horrible those 3 hours might have been. I have found very, very few people who can imagine what follows the crime, what are the ramifications on the victims and the family.

My sense of disillusionment with our court system is so great that the year following the crime was much more painful than those 3 hours I described to you. I cannot in good conscience urge anyone to prosecute. This is a great personal loss to me.

I started out a moral, concerned citizen. There was a year between the assault and the actual trial. The assault occurred in August 1978. There were trial dates in January, April, June, and finally the trial took place in August 1979.

After the assault, because the police came to the scene and apprehended the assailant, I was told it was very unlikely there would be a trial. This was the advice I was given in August, September, October, November. In December I called the county office dealing with insurance matters because I had been receiving therapy and was uninformed about reimbursement.

The secretary who answered the phone said, "Oh, yes, I can imagine, dear, you really do need help, what with the trial coming up and everything." At that point I had been convinced there would be no trial.

I said, "Trial, what trial?" and the secretary said, "Why, dear, there is a trial in January." I was surprised.

I was contacted for a pretrial conference in, I believe, January, preceding the January trial date. I was asked to report to a particular office. I reported, opened the door, and entered. It was like a reenacted drama of the August 31 hellish experience. I saw everyone involved that day.

I began to shake. For the first time in my life, I shook from head to foot. Every face was a terrible reminder of the ordeal I had been trying to put behind me in trying to get on with my life. I could not understand why all these people were there to meet me.

It was such a terrible reminder that I could not think or speak. I was given no option for a private conference which would have demonstrated in my opinion, basic decency.

I work as a children's librarian, have worked full time for several years. At this point I was in charge of a children's section of a community library.

I was quite familiar to the people there, at least by sight. The public exposure aspect of my work explains why I do not want my name used today. In 1979 I was working among the children in the library. The room was filled with patrons. In walked someone from the sheriff's office who says, in a loud voice, "Are you Geraldine X?" I was stunned. I looked up from my work. I remember I was helping a patron, when he said in the same loud tone of voice in the middle of the public library, "Here is a summons for you to appear in court on January 22," or whichever trial date it was.

I was embarrassed, confused. I looked around the room and saw people staring at me. Did I have to explain, ought I to explain that I was not a criminal, I was a victim? Why did I have to explain anything?

I ran to the office and cried and cried, shaking from the shock. The trial was postponed from the January date, then again postponed from the April date. We were given the information that certainly the trial would take place on the June date. My father, who happens to be a trial attorney, flew at his own expense from Washington State to be with me. We were waiting in the hallway of the courthouse.

Preceding each one of these trial dates, I had many physiological symptoms that gave me a great deal of trouble, a lot of the emotional trauma. There was not in that year of trial dates, one birthday, one dinner engagement, one school field trip, that did not precede or follow one of these four trial dates.

I was never able to give anyone a sure answer. Perhaps I could give a presentation, perhaps I could accompany one of my children on a field trip.

When we were there that morning for the June trial, someone calmly came up and informed us, myself, my father and my husband, that, oh, the trial would not take place that day, although we had been told it would take place for sure, that certainly we would understand the important judge had an important speaking engagement with the Virginia Bar Association on Wednesday, and, of course, we would understand that since this trial would probably take up to 5 days, the judge wouldn't be able to hear our trial on Monday because of his important commitment on Wednesday to inform, I assume, other lawyers in the State of Virginia.

I didn't understand. I became hysterical. For the first time I said—and meant—I did not know whether I could survive until the August trial date.

By the time June had arrived, my family and I had been through so much, I didn't realize a human being could survive that much anguish. When I woke up the next day after the June postponement, I was surprised I had endured that much grief and still could get up the next day and walk around.

After this horrible experience in June, I sat down one morning with the paper and saw a headline about "victim input," a victim impact statement. I had never heard the term before. This was in June 1979.

I read the article eagerly, for in this article a Federal judge in Baltimore was suggesting that a victim's point of view be included in the presentencing package.

Finally, I had a forum. Finally, there was a chance to be something besides overlooked by the judicial system. I was very excited about this prospect. I immediately contacted the assistant State's attorney and asked that he put a notation in the presentencing folder or whatever went to the parole and probation board so that I would be interviewed before the sentencing for my point of view on the impact on myself and my family. He did so.

I have been raised to believe in the law, to respect the court. I was a slow study. It wasn't until 2 weeks before the sentencing that I realized I wasn't going to be interviewed. They weren't going to honor my request.

I called the judge who had heard the case at the trial in August. The secretary told me to call the parole and probation officer. I called them and I told them which case I was involved in, that I wondered why I hadn't been called for an interview. I was told by the parole officer that the presentencing folder was complete. If it wasn't in the judge's office presently, it was en route. I suggested that it was not complete in my view, because my request had not been honored. I said, "I am also a county employee, I work 10 minutes away. I can be at your office in 10 minutes. Shall I come now, or in 1 hour?"

In other words, I forced myself upon this man. I came with a statement I had written at home so I would be well briefed to give him the impact on myself and my family.

I came in but he did not interview me. He didn't know why I was there. I asked him if he had interviewed other victims. He said only when it involved some kind of property, something about replacing a stolen television for example.

I asked him why he wasn't taking notes. He was sitting on the edge of his chair aghast, I think, at seeing a real, live victim. Very uncomfortable. He suggested that I leave my victim impact statement with him and promised it would be included in the presentencing program.

I talked at him for 1 hour. The man was almost in tears. He didn't know what to do with me. I am sure he felt relieved when I left. But he did give me the promise my impact statement would be included in the presentencing folder. I heard from my friends that it was permissible for a victim to attend the sentencing. No one in the judicial system ever informed me about that.

I did appear at sentencing. The defense attorney suggested that by my very presence I was overreacting to being raped, kidnaped, and robbed. I was insulted.

During this session the defense attorney asked the judge to disqualify himself because the defense attorney understood the judge had read a so-called victim's impact statement. The judge took my statement—I will never forget this—and said, "This? I have only read this as a matter of mere curiosity. It didn't influence me one bit."

I turned to my husband and said, "I suppose if I punch out the defense attorney, they will use this as justification for tossing out the case."

That victim impact statement had cost me 4 hours of crying time and a month of symptoms. Fortunately, the judge did not disqualify himself and the assailant did receive a life sentence.

Finally, 13 months after the assault in October 1979, the formal reminders were behind us. Finally, we could try to put our lives back together.

In October 1979, like many of you, I suspect, one of my routines after a workday when I return home, is to check my mailbox. It is a very positive thing. I am in my safe place. I love to get mail.

So one day in October, I checked my mailbox. There was a letter from my assailant. He had been sentenced to life. How could he get me? How did someone let him get to me again?

I threw the letter at my teenaged son and asked him to take it. I didn't know what kind of sickness it contained.

I did not give my address in court, again, not because anyone in the court system informed me I need not give my address, but because a friend of a friend told me I need not. Who gave him my address? It must have been somehow made available to him through the court process

I thank you for this opportunity to testify. I hope that because, unfortunately, there will be future victims—I hope that my testifying today can make their experience a little less painful.

Senator LAXALT. We thank you very much. It is obvious you have gone through unmitigated hell during the course of this experience, but as you yourself have indicated, I think your testimony is going to be of immense help to the members of the committee and certainly Members of the Senate. Because if I have ever heard a case which cries for relief, it is yours.

Have you had an opportunity to examine our legislation?

Mrs. X. I took a copy. I am going to take a copy home with me. I have not read it as yet, sir.

Senator LAXALT. Tell me in summary, and maybe this is unfair and without notice, and you have had your fair share of all that, based upon your own experience, what would you offer by way of Federal legislation to somewhat mitigate the very serious problems you have experienced as a victim?

Mrs. X. The most pain stemmed from my being overlooked. Something should be done that mandates a victim be kept informed and included in the judicial process. Whether it is rape, and I can only guess for some of the other crimes, but the greatest insult is being overlooked. Your humanity is overlooked. You lose control when you are a crime victim, and if the judicial system can offer some control by informing the victim then, as I said, information is power.

If a victim isn't included in the process, she cannot make choices. The victim should be given options.

I cannot tell you how many times when I asked a question I was urged not to take this trial process personally. It was a crime against the State, and I was a mere witness.

Senator LAXALT. I gather from your testimony that that provision which we contemplate including, the victim's impact statement, would help materially.

Mrs. X. Absolutely. I worked with Senator Denis of Maryland, and am happy that a victim impact statement bill passed in the State of Maryland. If that provision could be included in the Federal legislation it would act as an example to the other States.

I didn't mention a followup on the victim impact statement. I did write a letter to the judge, whom I felt insulted my victim impact statement. I asked him to please in the future consider victim impact statements as a source of useful information and not as a matter of mere curiosity. He responded by saying that he did not take my statement into account because I did not present it before an officer of the parole and probation board. As if I hadn't tried.

That was 1979, not 15 years ago.

Senator LAXALT. Thank you so much.

Senator Heinz?

Senator HEINZ. You have had experience not only with the judge, but with the prosecutors. It is my understanding that the Montgomery County Police Department has asked you to try and help them in treating rape victims better. Do you have any thoughts on how prosecuters can be more sympathetic or more understanding, more humane in their treatment of people such as yourself?

Mrs. X. I certainly do have a lot of opinions. When I talked to the police—I did a series of workshops in the Montgomery County Police Department—the first thing I emphasized was that whether a person is a prosecuting attorney, a judge, or the President of the United States, I would urge him to examine his own feelings about crime. In my particular case, about rape.

What I feel is that most people are so afraid of being victims themselves that when they are dealing with a victim they treat us as anathema. Our very existence makes them uncomfortable. I imagine I look like someone you know. Maybe I look like someone you love? I might make you feel uncomfortable just by my existence. Rape happened to me. It wasn't nice. It wasn't midnight, and I wasn't alone or in a bar. I didn't ask for it.

This makes people uncomfortable. I would ask the prosecuting attorney not to hide behind sarcasm here, nor employ the games of the law, not to be afraid of being somehow compassionate, not to confuse cold with professional.

I found very often that somewhere in each judicial officer there was a human being, but how easy it is to refer everything to the secretary to never confront the victim. Again, the discomfort level is high.

I felt when I asked questions they were answered, but if I didn't have enough information to ask—for instance, I honestly didn't know as a layman that sentencing took place a month later. I thought the sentence would be at the end of the trial. I was left ignorant.

Senator **Heinz**. In other words, what you are really saying is that although the criminal may have every step of the way explained to him by his lawyer or, if he can't afford his own lawyer, by a court-appointed lawyer paid for by the taxpayer, there was no one in your case who ever had the courtesy or the simple decency to explain the process and sit down with you and let you know, no matter how uncertain the process was, what it was comprised of.

Mrs. X. Absolutely. I waited 1 day outside the courtroom because the door was shut. I didn't know I could open the door and walk in. I missed part of the testimony. I felt that the 1-year delay served the defendant quite well, but every one of those days was hell for our family.

Senator **Laxalt**. It seems to me that we have an enormous problem in this country with the plain education of law enforcement people. You will have to aid us, and probably already have, in raising their level of consciousness, and sensitivity. I was a prosecuter myself, and you get so occupied in processing files that individuals get lost in the process.

The cases really became, literally, numbers. It would seem to me aside from the obvious political remedies you have of bringing this kind of dereliction—that is what it is, gross dereliction, to the attention of the electorate, in addition, if it is not being done already, it seems to me we should have seminars for prosecutors, for probation officers, and give them additional insights into problems victims are experiencing. I just cannot believe that these people are inherently insensitive and don't care.

Mrs. X. My suggestions for improved communication do make things more encumbered. I felt when I did get someone's attention, that person could listen, but it was interpreted as interference in the sense that if you do take into consideration the victim's rights, it is going to make your job more difficult.

Senator **Laxalt**. They have a dual responsibility. They focus so narrowly on the other side in terms of essentially getting a conviction or cleaning up a file. I think most of them just aren't aware of the fact that they do have a real, clear responsibility to the victims in the process.

I think that is part of our challenge. We can mandate it, but as we all know, all the legislation in the world is not going to cure those attitudes. There we have an enormous amount of educating to do, and people like you contribute materially. You obviously already have.

Mrs. X. I hope the situation will improve, because I think everyone, even the most calloused, who gets into the judicial business really does want criminals prosecuted. With the kind of treatment victims have been getting, I would never shame a person into going to the court system. I could not.

Senator **Laxalt**. No one could fault you for that, based upon your experience, to be sure.

Senator Heinz, do you have anything more?

Senator **Heinz**. No, thank you, Mr. Chairman. I am just extremely grateful to Geraldine X for coming forward and reliving once again an experience which is lived more times than anybody ought ever to ask of a human being.

Mrs. X. You are welcome.

Senator **Laxalt**. On behalf of the committee, we thank you as well.

[The prepared statement of Mrs. X follows:]

Prepared Statement of Geraldine X

On August 31, 1978, at 9:15 a.m. in the Public Library in Montgomery County I was kidnapped at gunpoint, then raped and, after being terrorized for three hours, forced to write a check for the balance in my family's bank account. The assailant threatened to kill me if I spoke a word. He asked whether my children were at home alone. During the car chase preceding his capture, the assailant yelled that he would "Get Me" for calling the police (I had mouthed the words "Help" and "Police" to a bank teller and gas station attendant).

The sense of outrage I feel because I was a victim, is enormous. My life has been permanently changed. I will never forget being raped, kidnapped, and robbed at gunpoint.

However, my sense of disillusionment with the judicial system is many times more painful. I could not, in good faith, urge anyone to participate in this hellish process.

The police believed there would be no trial so I looked forward to putting the terrible experience behind me. I started therapy and it was only when I was talking to a secretary in the county office in December about my therapy bill, did I learn that a trial was scheduled for January. As it turned out, at the last moment the January trial was rescheduled for April, then June, then August. During this period there was no vacation date, dinner date, birthday, which avoided a time period anticipating or recovering from one of these trial dates. The year between the assault and the trial served the assailant, but made the crime last for me not 3 hours, but 350 days. The first formal contact was a January pretrial conference. I walked into the room and was stunned. There sat all the witnesses. I flashed back to the day of the August assault. Each face was an anguishing reminder. I began to shake. It was difficult enough to recount the event without having to relive it with all the witnesses there. No one had prepared me for this or offered me the option of a private conference. Before another of the four trial dates, I was supervising the children's section of the public library where I had worked for some time. Suddenly I heard someone say, loudly, "Are You Geraldine. . . .? I am serving you with a summons to appear in court." I was confused and embarrassed as I looked around the crowded room and saw library patrons staring at me. Did I have to explain? I rushed to the back office and cried.

My father a trial attorney flew at his own expense from Washington State to attend the June trial. We reported to the court house ready for the trial. Instead we were told by a clerk that the trial must be rescheduled for August because the judge assigned could not hear a 5 day trial and still keep a speaking engagement for the Virginia Bar Association. I remember sobbing in the courthouse and wondering whether I could endure living until August after this bitter disappointment.

After the trial, but before sentencing, I read about the federal court in Baltimore requiring the probation department to submit a "Victim Impact Statement" to the judge. I thought finally the views of the victim could be included in the judicial process. I asked the Assistant State's Attorney to notify the Parole and Probation Board that I wanted to be interviewed. He did so. Two weeks before sentencing I had not been notified. When I called the parole office I was told the file was complete and ready for the judge. I disagreed, insisting that I be interviewed. I met with a parole officer who listened, but took no notes. He suggested I leave a copy of the victim impact statement I had written at home. He promised to include it in the pre-sentencing folder. At sentencing, the defense attorney asked the judge to disqualify himself for reading my statement, saying the information was "prejudicial" and not relevent. The judge refused saying that he read it only out of curiosity, that it did not influence him whatsoever. When I subsequently wrote the judge asking that he consider future statements more seriously, he said he objected to my statement because it was not done in the presence of a parole and probation officer. Also at the sentencing, the defense attorney suggested I was over-reacting by being present.

In 1979, having survived the year of pretrial conferences, trial postponements, sentencing, the emotional and physical upsets; I was eager to rebuild my life now that the formal reminders of the assault were past. Like many people, I enjoy checking my mailbox when I return from work each evening. One day in November, 1979 I reached into the mailbox and saw a letter from my assailant. He had been sentenced to life in prison. I was at home, my "Safe Place". How could he get to me there? I felt vulnerable, frightened, and confused. I certainly did not feel protected by our justice system. How could this system allow him to once again intrude upon me and my family.

I thank you for the opportunity to speak today and hope that I can help other victims receive fairer treatment.

Senator LAXALT. May we hear now from Virginia Montgomery? Virginia, it is nice of you to come here. I know you have had your fair share of grief, too, to say the least, and we greatly appreciate your taking the time and trouble to come here and testify before us.

Mrs. MONTGOMERY. Thank you. I am happy to have an opportunity to present my side of the story. My name is Virginia Montgomery. I am 62 years old. I am a retired Federal civil service employee.

I now live in Bowie, Md. A year ago, on May 11, 1981, I had left my rented room at the Roosevelt Apartments for Senior Citizens to go to my bank on Capitol Hill. Around noon, after I had cashed a check for $25, a man came up from behind and grabbed my pocketbook. It hit me like a bolt of lightning. I did not see or hear him at all. I was holding my shoulder purse next to my body, yet he grabbed it with such force that the strap broke and I was spun around off balance.

As I fell, I hit my back against the curb and I heard something snap. The next thing I remember, a policeman, who I think was a crossing guard, came running over and asked how badly I was hurt. He got someone to call the police and an ambulance while he chased the man. I was hurt badly and taken to the Capitol Hill Hospital where I had surgery for a broken hip and was hospitalized until the end of May.

The experience of the crime was bad enough, but my experiences afterward added insult upon injury.

For months, I was left wondering what had happened to the man who committed the crime—would there be a trial? Would I have to testify? Would he go to jail? After the day of the crime I was not contacted at all by anyone in the criminal justice system. The first word I received about my case was 9 months later in February, while I was recuperating at the home of my daughter in Texas, I received a letter from a probation officer saying that I was the victim of a purse snatching and I would be awarded $350 restitution. I was really upset.

Questions filled my mind. Why was there not a trial? Would this mean I would not have a chance to tell anyone what had happened to me? And why was I given only $350 in restitution when in fact my medical bills were over $11,000? I just couldn't understand what had happened, so I called the probation officer in Washington.

He told me he was not aware of my injuries since there was no mention of them in my file. He suggested that I file a civil suit for damages and gave me several organizations to contact.

When I returned to Washington, I attempted to resolve my problems and questions. I was sent from bureaucrat to bureaucrat, from floor to floor with no resolution of my problem. I was frustrated.

Finally, I contacted the probation officer because he was the only sure number I had. I told him I would like to see him, but he said he had a very busy schedule. After much delay he reluctantly agreed to see me. I went to his office and waited even longer while he shuffled papers, answered phones, et cetera, completely ignoring me.

Finally, he abruptly put down the papers and said, "OK, Mrs. Montgomery, what can I do for you?" I said, "That's what I came to ask you." He said, "What do you mean? That case is closed, you got $350 restitution." I asked, "What was the man charged with?" I got a look, as much as to say "What business is it of yours?" He replied, "Attempted purse snatching."

Then I asked what his punishment was. Very reluctantly he leafed through the file, looked up and said, "He got 2 years' probation."

I said, "Well, what do I do now?" He said, "Go get yourself a lawyer if you want to. There are plenty of lawyers out there. That's all we can do."

I was terribly upset. There was not a single person in the system to help me. The probation officer seemed to care more about the "poor criminal" than me. I was even beginning to feel guilty about inquiring about the case. I felt like I was being treated like a criminal. Tears came into my eyes, so I excused myself and left.

Legal counsel was not able to help me, so I proceeded to contact one agency after another trying to find a way to pay my doctors' bills.

I have not had a pleasant day for 1 year. I can't walk without the aid of a cane, I have no money, and only after I had been contacted by Senator Heinz' office did I get a call and letter from the U.S. attorney's office apologizing for neglecting to let me know what had happened in my case.

It seems as though the victim of the crime is the last to know anything. There is no one to represent me, the victim. Everyone in the system seems to only care about the assailant. I have felt like I am down in a hole with no way of getting out. I can't get the medical treatment I need because I can't pay the bills I already owe, let alone face the possibility of running up possibly several thousand dollars more in medical and hospital costs.

Thank you.

Senator LAXALT. Thank you very kindly, Virginia. It is apparent from your experience with the Federal system that the problems we have are not confined to the State and local governments. We have our fair share of problems at the Federal level.

Are you telling me you went through this whole process and you weren't even advised that the file was closed before you knew anything about it?

Mrs. MONTGOMERY. That is correct. I knew nothing about it until I came back to Washington, and apparently this took place in September or October.

Senator LAXALT. Did they make any effort to try to find you? Were you in Texas at the time?

Mrs. MONTGOMERY. I notified them. I notified the police officer before I left, gave them the address where I would be. He told me that he himself would notify me when the court notified him, just in case the court didn't notify me. I heard from no one.

Senator LAXALT. That is unbelievable.

Mrs. **Montgomery**. When I talked to the probation officer, he said, "Well, usually the policemen are so busy that they just go ahead and file and then they turn it over to the court and then the court comes along and takes it up from there."

Senator **Laxalt**. Was there anything in the file other than the officer's statement?

Mrs. **Montgomery**. Nothing that I know of. I don't know anything about it. I know nothing of the case at all, except the letter that I got from the probation office.

Senator **Laxalt**. On what basis in this process did they arrive at $350 for full restitution?

Mrs. **Montgomery**. I have not seen the file. I have no idea.

Senator **Laxalt**. You haven't inquired to determine whether that figure was simply pulled out of the air?

Mrs. **Montgomery**. There was no record at that time that I had been injured. I really don't know anything about my case.

Senator **Laxalt**. Apparently this matter was disposed of on a probation basis. Were you contacted at this point at the time of sentencing?

Mrs. **Montgomery**. No.

Senator **Laxalt**. So you were totally ignored for all intents and purposes throughout the process, other than being victimized originally.

Mrs. **Montgomery**. The only thing I heard about it was when I received a letter from the probation officer while I was in Texas saying I was the victim of a purse snatching.

Senator **Laxalt**. Have you had advice of legal counsel?

Mrs. **Montgomery**. No, sir, I haven't been able to get anyone to help me in this matter.

Senator **Laxalt**. Has any determination been made, or inquiry made along those lines as to whether the assailant is judgment proof?

Mrs. **Montgomery**. I have tried to contact many people, but have made no headway so far.

Senator **Laxalt**. We thank you for your testimony. It is immensely helpful to us.

Senator Heinz?

Senator **Heinz**. Mrs. Montgomery, in addition to the fact that you took a terrible loss, and the minimal restitution you have received, I see that you still have a walking aid with you, and you were assailed in May of 1981. Is that correct?

Mrs. **Montgomery**. Yes.

Senator **Heinz**. It is now May 1982, and I gather you are recuperating, or trying to recuperate from your injury?

Mrs. **Montgomery**. At the time I went to Texas, I was still in a wheelchair. My doctor examined me before I left, and I told him I had trouble with my back. He said, "It is possibly because you are walking with the walker yet."

I got to Texas and was examined by an orthopedic specialist there. He said, "Well, maybe it is because of walking with the cane and a walker." They suggested I go to an internist. The internist examined me and he said, "It looks like you have real problems, but we will have to do some extensive tests, and they are very expensive."

He had me admitted to Clear Lake Hospital in January. When I went to go into the hospital, I had to call them in advance and give them my hospitalization number. They said, "There will be a $450 deposit." I didn't have the $450. I had to cancel.

Through various agencies, they finally, after contacting many different places, they told me to contact a hospital in Galveston. They said that with my doctor's consent, they would take me and I could pay on a month-to-month basis out of my social security.

They would take me. My doctor consented. They said they would take me as soon as there was a bed available. I am still waiting for a bed.

Senator HEINZ. So in effect, although you have to spend nearly $11,000 for medical treatment, in fact you are not able to afford the additional medical treatment you probably need in order to get over your injuries.

Mrs. MONTGOMERY. I have no money, but I have been ordered into the hospital by the doctor.

Senator HEINZ. I think that is eloquent testimony to the amendment Congressman Fish referred to. It is my hope we can find a way to enact that amendment to provide restitution of victims from a funding source that is paid for by the criminals themselves.

I think it is outrageous that you should be denied medical treatment as the result of a crime simply because you can't afford it, and you have made a very compelling case, and we are very grateful to you.

Mrs. MONTGOMERY. Thank you very much.

Senator LAXALT. Virginia, I guess you realize the purpose of this legislation is to avoid the kind of situation you have experienced. Under the terms of this legislation, if we are able to pass it, you would be advised all along the way. You would be permitted an opportunity to file an impact statement.

I think, more importantly, economically, there would be no probation here, because restitution could be made a condition of that probation. That means he wouldn't be walking around the streets, unless some provision was made to make you financially whole. That is aside from the emotional trauma you have experienced.

You, as Senator Heinz indicated, epitomize the kind of case and the kind of wrong we are trying to redress with this kind of legislation. We thank you for coming here, and we certainly wish you the best.

Mrs. MONTGOMERY. Thank you very much.

Senator LAXALT. We will now hear from Marlene Young, the executive director of NOVA, who has made as significant a contribution as anyone I know. We appreciate your coming in. We would like to have you summarize what the activities of NOVA have been and what your impressions are with respect to this legislation.

Dr. YOUNG. Thank you very much, Mr. Chairman and Senator Heinz. I am privileged to be here on behalf of the National Organization for Victim Assistance, although I feel somewhat sobered by the testimony that has been given by these victims.

I think that testimony speaks eloquently by itself, and for that reason I would like to ask that my written statement be entered into the record in full, so that, in the interests of time, I can make my remarks as a brief commentary on the previous testimony.

Senator LAXALT. Without objection, it is so ordered.

Dr. YOUNG. Whenever I hear statements such as you have heard today from victims of crime, I have a sense of outrage. It cannot help but be engaged by their reports, but more importantly, I feel outraged because these victims are representative of thousands and even millions of other victims across the country who run into the same kinds of problems that you have heard about today.

I have been working in this area for some 8 years, and when I hear that kind of testimony, it engages my memory of the victims they represent and I think of the victims I have seen, and I have talked to.

I think of a 78-year-old woman who sat in the middle of a burned-out house, after being burglarized 10 times in a year, the last one resulting in arson, who pleaded with me to kill her because she didn't want to face the crime and the threats from her society any more.

I think of a rape victim who was left without her clothes, after a hospital examination where her clothes had been retained for evidence, who was left to get back home in the rain, wearing a paper hospital gown.

I think of the surviving family member of a homicide victim, a mother whose daughter was killed and who waited 7 years to have the murder case go to trial. When it went to trial, because evidence had been lost and witnesses were no longer available and for other reasons, the offender, the accused, was allowed to plead guilty to a manslaughter charge, and he walked out of the courtroom a free man.

I think of those victims I have known who attempted to enter into the criminal justice system in search of justice and got rebuked and abused in the same way that you have heard about today, and I think it is important for us to reexamine our criminal justice system and think carefully about what it offers the public, both in helping them get protection and helping them prosecute a crime and participate in that process if they choose to.

What I can say is that in most jurisdictions our criminal justice systems have nothing to offer them.

Victims of crime usually suffer one or more of three direct kinds of injuries, and you have heard about them today: financial loss, physical injury, and perhaps more importantly, psychological trauma and stress which tend in some cases to affect the rest of their lives, to damage home lives, to destroy families and perhaps making them fail at the jobs they have been working at for years.

But in addition to those direct kinds of injuries, there are what many call the second injuries, the injury done to them by the communities and their criminal justice system.

The injury done by their communities—because, as Geraldine said, people don't want to talk about crime victims, and they don't want to face their pain and their suffering. People don't want to hear about those stories because they do make us feel uncomfortable—we too also may become victims and we don't want to hurt.

It is similar to the way we ignore elderly people in nursing homes, because it is too close to death, and suffering, and it is too hard for us to face that. We place the same kinds of aspersions and stigma on crime victims.

And that is how our communities revictimize crime victims. Then if they go through the criminal justice system and face the delays, and the lack of notification, and that is a second injury too. And there are also horrors for many victims after a suspect is arrested and prosecuted, horrors to make them never want to participate again, and also horrors that increase their fears, increase their financial losses, and in some cases actually increase their physical suffering, because the kind of stress they go through has all the physical symptoms of stress, nausea, headaches, lack of sleep—and it goes on for years. And this is suffering that is brought on by the criminal justice system, primarily, not the victim.

Financial losses, are a common second injury because we don't help witnesses get to a court. When we subpena them, they have to pay for transportation, they have to pay for child care, they have to appear on their own ticket, as it were, often losing a day's pay, and so we add a dollar penalty to the whole psychological impact of the second injury affecting those victims.

These are the kinds of direct and indirect injuries and outrages that Mrs. Montgomery and Geraldine X went through, and so many others, that cry out for reform. So I commend you for putting together the legislation in front of the committee, and I think that there are at least, three points I would like to address briefly on why I think your legislation, S. 2420 is responsive to the kind of suffering and injuries we've heard about today.

First, the bill calls for a victim impact statement, and Geraldine has spoken about what that means to her personally. I can add that I think it means to many victims the chance to be weighed in the balance with the offender, to see what the crime has meant to the victim, and have that a regular part of the sentencing procedure.

Second, the bill includes sections to protect victims and witnesses from harassment and intimidation. Surely that kind of protection should extend from the time the crime was first reported through the sentencing process, and after. How can we expect victims or witnesses to come into a courtroom and prosecute a case if they expect to hear from that defendant in retaliation or intimidation thereafter?

Third, the bill offers to set fair standards for the treatment of victims and witnesses in our judicial system by simply providing them with information, notification, counsel, participation in the process, and with the essentials of understanding what goes on in a courtroom, letting them know what goes on with giving testimony.

I think the idea of having fair standards for victims is absolutely crucial, and to me, if I think about it for even a second, I find it incredible that our system does not yet offer that kind of information and that kind of notification and that kind of consultation.

Senator LAXALT. In your experience, are there any offices, any prosecuters, any probation officers, who, because of a heightened sense of sensitivity offer this service? Is this just wholesale around the country? Is everybody as insensitive as the offices that these women have experienced?

Dr. YOUNG. In the last 8 years there has been some progress in some jurisdictions and they set an example as to what can be done in the judicial system. In the State of California, for example, victim impact statements are required routinely in the sentencing and the presentencing process.

Senator **Laxalt**. This is at the State level?

Dr. **Young**. At the local level, but it is mandated by a State statute.

Senator **Laxalt**. Do they do anything voluntarily at the Federal level?

Dr. **Young**. No; not that I'm aware of. In local jurisdictions where they have a progressive system of victim and witness services, they often complain they do not have cooperation from the local U.S. attorney's office, in dealing with the victims and witnesses.

In places where they have victim or witness counseling, we would often advise them to proceed in the State court, if there is a choice. The Federal prosecutors often have a good reputation as lawyers, but to us, that is not good enough.

Let me say at this point that I commend the legislation to your colleagues and commend you for helping to introduce it. I would urge your colleagues to consider the balance of justice in our system as a whole, State and Federal, and the national leadership the Congress can take, and the Federal Government can take, in serving as an example to the rest of the country, and to the many jurisdictions that have yet to implement these kinds of services, and advising them that, yes, indeed, we have to balance the scale of justice in this manner.

I would also urge you to consider seriously, perhaps using S. 2423 as a model, to amend the legislation before you so that the bill would compensate victims in the Federal system who have suffered criminal violence, so their medical bills can be taken care of, or so their families are not made destitute.

In conclusion, I would say I think that you, the Senate, the House, and our Government as a whole, have an obligation to consider the testimony of Geraldine and Virginia, both as individuals, but also as representatives of the 171,000 women who are raped every year, the [illegible] million people who were assaulted, and the 7 million people who were burglarized—that Government policymakers have an obligation to consider the fact that one in three American households [illegible] victimized by crime every year—and that, just as we have an obligation to declare fervently the rights of the accused in order to protect the innocent among the accused, so do we have the obligation to declare fervently the rights of the victim, to make sure that our system of justice insures justice for all—even for the victims of crime.

Thank you.

Senator **Laxalt**. We thank you, Marlene, very much, and as we nurse this baby along, we hope that you will continue to stay in touch with us and offer us your constructive comments, especially with respect to provisions of the bill where you think we are not doing as well as we might, but more importantly, as this gets through, and as we continue our hearing process, I am certain we are going to have constructive suggestions, and we want your input on that. You are working in the field and you are working in real life rather than in abstraction and theory. We thank you, Marlene, for your help and for coming today.

Senator Heinz?

Senator HEINZ. Congressman Fish in his testimony made four additional suggestions to the committee. I think you are probably familiar with his four suggestions. Are you not?

Dr. YOUNG. I have not had a chance to read them.

Senator HEINZ. Would you read them for us and give us your evaluation and your thoughts on whether or not we should attempt to incorporate them into our legislation?

In addition, Congressman Fish made some other proposals that involve legislation that is in one of the other bills reported from this committee as part of the criminal code reform, I believe, that he suggested we might want to include, that he is pushing over in the House.

We would like to have your comments on those, as to whether or not we should attempt to incorporate them in this legislation. It is pretty clear that the legislation on the so-called criminal code reform bill is not going any place this year. There may be things in there in addition to what we have in our legislation now that would be helpful.

Dr. YOUNG. I will do that.

Senator LAXALT. Thank you all very kindly.

Dr. YOUNG. Thank you.

Senator LAXALT. I couldn't help thinking that you come from a part of the county that is one of the most sophisticated and advanced. Is it not ironic that you were treated to this barbaric treatment?

Mrs. X. Makes you want to scream, doesn't it?

Senator LAXALT. It certainly does.

Mrs. X. Good.

[The prepared statement of Dr. Young follows:]

PREPARED STATEMENT OF MARLENE A. YOUNG

Mr. Chairman, I am Marlene A. Young, Executive Director of NOVA, the National Organization for Victim Assistance.

We have been to Capitol Hill before, Mr. Chairman, but never on so gratifying a mission as to voice NOVA's support for an omnibus victims' bill -- indeed, the Omnibus Crime Victims Protection Act of 1982.

We in the victims movement are honored by the company we find ourselves keeping as supporters of S. 2420: Senators Heinz and Laxalt, and Chairmen Thurmond and Mathias, and Senators Biden and Kennedy, among dozens of their colleagues.

Two of the co-sponsors of S. 2420 are relatively old hands in the victims movement; both Senator Paul Laxalt and Senator Edward Kennedy, I am pleased to note, are past recipients of NOVA's Donald E. Santarelli Award for their services as public policymakers to the victim's cause.

The first recipient of that award, I am also happy to recall, is Chairman Peter W. Rodino of the House Judiciary Committee. So we are hopeful, Mr. Chairman, that what is being initiated here in the Senate will be treated most favorably in the House.

Mr. Chairman, my duty as NOVA's executive director is to speak in behalf of NOVA's dual constituency -- the millions who are victims of crime each year, and their thousands of helpers and advocates, both paid and volunteer.

You have already heard this morning from some of the victims, victims who have suffered at the hands of the criminal offender, and who have suffered as well at the hands of the criminal justice system. It is the pain and outrage which they and so many others have endured that have caused us, victims and service providers alike, to seek redress from our lawmakers.

We have sought the aid of our lawmakers at the municipal and county levels -- and they have responded. In fact, the great majority of policy changes and public appropriations made in the victim's behalf over the past decade have been made locally.

We have also sought the aid of our state lawmakers -- and they too have responded. Indeed, everything contained in S. 2420 and its important companion bill, S. 2433, involve experiments that have already been tested successfully in the states.

So we come to our federal lawmakers today to ask them to respond as well. First, our request is that Congress exercise its national leadership responsibilities by implanting in the federal system a number of the victim-oriented reforms that are by now familiar features of the administration of criminal justice in many states.

And second, we ask that S. 2433 be adopted as an amendment to S. 2420 so that the legislative package includes protections from financial disaster when violators of the federal criminal law leave their victims dead or seriously injured.

To explain our request, that S. 2420 be enacted with the proposed amendment, I should first of all summarize the four kinds of harm that crime inflicts on victims. An expanded primer on those injuries, and on the methods available to alleviate them, is contained in our Campaign for Victim Rights manual, a copy of which I am pleased to offer for the record. I am also pleased to acknowledge the aid of the Office of Justice Assistance, Research, and Statistics, of the U.S. Justice Department, in the preparation of that manual.

1. The Harms that Need Healing

Victims of crime are subjected to three primary injuries: physical, financial, and psychological.

Physical injuries range from those categorized as "simple", such as a bruise, a minor cut, or a broken wrist, to those which are unquestionably "serious", such as an assault that produces paraysis, or the ultimate violation, death.

But we are often misled by the way we categorize criminal injury. An older person who must move into a hospital or nursing home for an extended period because of a "simple" broken hip runs a high risk of an early death -- a pattern I saw in Portland, Oregon, in my work with elderly pursesnatch victims who sustained less than "serious" injuries.

Similarly, we often fail to understand the ultimate violation, murder, when we say "the victim" is at least out of his misery -- for in truth, there are many victims in a homicide, and the surviving family and friends are often left with a sense of victimization that they can never overcome.

Financial injuries, the second and most prominent ones caused by crime, seems less important than the physical ones, but again there is a popular tendency to downplay their significance.

I have talked to people in some 37 states over the last two years, and many have thought our system of private insurance deals well with the victim's financial loss. They overlook the financial losses of persons on low or fixed incomes, unable to afford insurance, or to repair windows broken by mischief-makers, or to replace the stolen $50 that was to pay for a month's groceries.

I have met many victims of such "minor" property crimes, all classified as misdemeanors, and have seen one such victim suffer severe malnutrition and another come to an early death.

My colleagues and I have also seen countless victims who have discovered that they lost thousands of dollars because their insurance policies covered the market value of their stolen property, not replacement value.

And, third, there are the psychological injuries, the amorphous yet life-threatening aftershocks of crime which often bring on anger, fear, depression, even nausea and other physical ailments, none of which have been adequately studied. But those of us who have worked with victims of crime or have ourselves been the victims of criminal attack know well the destructive potential of "crisis", which is the term commonly given to the extreme stress reaction some victims experience.

We are speaking here of emotional injuries that sometimes render normal people unable to work productively, or to maintain relationships with others, or even hold together any part of their family life.

These are the primary injuries, the physical, financial, and emotional losses that are the direct result of criminal attack. We need to keep them in mind if we are to understand what some have called the "second injury" -- that inflicted by society and our criminal justice system after the crime itself.

The outrage of that second injury is that it is committed by the very people whom the the victim turns to for help in treating his primary injuries. The police officer, the neighbor, the prosecutor, and even the close friend, each in his turn can make the victim feel unwanted -- at best a repository of evidence -- or at worst a fool who brought his misfortunes on himself, and who deserves to be shunned. These are feelings, mind you, induced by people the victim naturally turned to in order to feel better.

Our society has blamed the victims of crime much as other societies have created and damned their pariahs. And we have developed mythologies to support that ostracization. The "state" has been substituted for the victim in our courts of law; victims are thought to be able to absorb their losses; offenders are thought to be the victims of social injustices, poverty, and discrimination; and the victim of crime is to be chided for his lack of self-reliance if not his actual contribution to his plight.

Reality contradicts such myths. The victim is the truly wronged party -- not the state; the most-often victimized are the disadvantaged among us -- the poor, the minorities, and the outcasts;

and self-reliance, while laudable, is no shield against many of life's accidents, disasters, and criminal attacks.

But because of those myths, victims enter into a criminal justice system in which they are once again mistreated, sometimes even brutalized. A victim of burglary who is summoned to the police station three times to have his fingerprints taken -- a victim of rape who is left after the medical-legal exam in the pouring rain in a paper hospital gown because her clothes are retained as evidence -- a surviving parent of a homicide victim who waits seven years for her daughter's case to go to trial -- or to a plea-bargained disposition -- these are the re-victimized victims.

In most jurisdictions such victims receive no aid beyond emergency medical assistance. They receive little information, no counsel, and lack protection from harassment and intimidation if they cooperate with authorities. They have no right to consultation or even knowledge of prosecutorial decisions, and no claim to information about where, when, or how justice will be administered in a case where they, the victims, were the injured parties.

2. Meeting the Needs of the Victim -- and of Justice

NOVA has never argued that the accused should be denied the rights guaranteed under the Constitution. What we have argued is that, in a system that seeks justice through adversarial proceedings, the victim deserves to be a part of those proceedings, and to be assured that his just claims to information, notification, protection, and restitution are honored.

All we seek, in essence, is a system of justice which takes into account the rights of the accused -- including the innocent -- and the rights of the victim -- including the innocent.

The bill you are considering today is a new beginning for the federal system of criminal justice. It is a new and long-awaited national statement of protections for victims and witnesses of crime.

In it is affirmation of the hope inspired by federal "seed" monies which, through the LEAA grant programs, helped to establish innovative victim and witness programs in some ten percent of the local prosecutorial offices in the United States in the 1970's. And it is a confirmation of the wisdom of those innovations by having it implemented in every U.S. Attorney's office in the country.

3. Comments on S. 2420

There are four parts of S. 2420 which are particularly noteworthy.

First, the bill calls for a Victim Impact Statement to be considered at sentencing. There is some weariness and pride in our organization as we heartily endorse requiring such a statement to accompany the pre-sentence report on the offender. The weariness comes from a decade of advocacy promoting such a balanced approach to the task of sentencing offenders; the pride comes not only from the fact that our board president, James Rowland, Chief Probation Officer of Fresno, California, "invented" the Victim Impact Statement about a decade ago, but that active NOVA members in Ohio, California, Maryland, and Nevada have helped to enact it in their states.

Second, the bill includes sections seeking to better protect victims and witnesses from intimidation. The harassment and threats which beset a victim or witness to a crime in many parts of this country are omminus. Those dangers particularly affect victims of federal crime, whose reluctance to report the case is in large part due to such intimidation. In addition to public exposure, the risk involved in reporting many crimes is ostracization from one's community -- particularly if it is a minority community -- and threat of immediate or long range retaliation -- particularly if the crime involves an older victim, gang violence, or the like.

NOVA has long pressed for the use of temporary restraining orders, conditions to bail that are protective of the victim, and the useof more stringent penalties for intimidating witnesses and victims.

Third, this bill mandates the consideration and the imposition of restitution unless the court states for the record the reasons for not ordering it. While virtually all American judges, by common law or statute, have the right to impose restitution, few have ever used that authority in a methodical way.

We feel strongly that restitution can be an appropriate sentence for many crimes, that it is an appropriate accompaniment to prison sentences, and that it is an appropriate condition of both probation and parole. The common argument against restitution has been that the offender does not have the money to comply with such an order. Studies seem to indicate that for the majority of crimes, restitution may not be more than is commonly set for bail (with which defendants seem to be able to comply), and for those cases where restitution may involve a long-range commitment, it may not be any more onerous than a standing civil judgment.

And fourth, the bill speaks to the establishment of federal guidelines for the fair treatment of crime victims and witnesses in the criminal justice system.

This section seems to do no more than help implement the recommendations of the U.S. Attorney General's Task Force on Violent Crime. It includes such simple things as the development of a brochure which provides information to victims and witnesses; notification of important criminal justice proceedings; consultation with the victim concerning plea negotiations, dismissals, pretrial release decisions, and diversion; separate waiting areas in court; and employer notification. In those jurisdictions where victim/witness programs have been operating for a number of years, most of these basic civilities have long since been implemented.

One of the more innovative and exciting aspects of these guidelines involves the provision for training of law enforcement officers through Federal training facilities such that those officers (and their trainees) assist victims properly immediately following the crime.

The excitement in that provision stems from two things. First, research has indicated that skillful police treatment of victims and witnesses is beneficial not only to those receiving that treatment but also to those enforcing the law. It can help improve accurate reporting, investigations, and prosecutions.

Second, "consumers" of advanced law enforcement training acknowledge the special status of such federal facilities as the FBI Academy. Thus, the bill offers both the incentive and the means to accomplish significant education in this field.

In closing, I urge you, Mr. Chairman, and your colleagues to consider carefully the balance of justice in the federal system and the scope of national leadership in setting an example of justice in the states.

I urge you to think of the victims that appeared here today and the fact that they represent more than countless statistics -- like the fact that one in three American households are victimized by crime each year, with 171,000 women raped, 4.7 million Americans assaulted, and 7 million Americans burglarized.

For behind these numbers is pain, and suffering, and hidden anquish. Consider then whether our system of justice cries out for change -- through a legislative measure which proposes justice be given to all -- even the victim...

Summary

Victims and witnesses who survive a criminal violation are often treated to callous neglect thereafter. Their losses and injuries, financial, physical, and psychological have for too long been left to the victims themselves to cope with -- without assistance or guidance.

Often their attempts at self-help are undermined by others who mean no harm but whose attitudes and actions compound the victim's distress -- a problem so common that it has been given its own label, the "second injury." Many such injuries stem from the criminal justice system itself. Fear of retaliation, lack of information, interest, or advice, court delays and postponements, and inadequate case preparation all contribute to the distress of a victim or witness.

S. 2420 and its companion bill S. 2433 provides a legislative framework through which the federal justice system can respond to these injuries. The provisions in both bills stem from innovative experiments developed over the last decade in a number of local jurisdictions and proven to be effective both in improving the treatment of victims and witnesses and in improving the efficiency of the criminal justice system.

We come to our federal lawmakers today to ask them to respond as well. First, our request is that Congress exercise its national leadership responsibilities by implanting in the federal system a number of the victim-oriented reforms that have become familiar features in many state systems.

And second, we ask that S. 2433 be adopted as an amendment to S.2420 so that the legislative package includes protections from financial disaster when violators of the federal criminal law leave their victims dead or seriously injured.

Behind the awesome yearly statistics which represent individuals victimized by crime is pain, suffering, and hidden anguish. Our system of justice cries out for change -- through a legislative measure which proposes justice be given to all -- even the victim.

Senator LAXALT. Our next witness is from the Justice Department.

We are running behind time. Perhaps you would proceed in a summary fashion, and we will include your full statement in the record.

STATEMENT OF D. LOWELL JENSEN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. JENSEN. It is a pleasure to be here today and present the views of the Department of Justice on S. 2420. I might say at the outset that what we have already heard is terribly moving, and as Dr. Young says, should sober all of us, and articulates in a way none of the rest of us can the urgency of the situation. I think this will point the way as has been stated, that we need to sensitize the system and instill an attitude in the system where there is a responsibility. I think you made the point, Senator, that there needs to be a level where people accept responsibilities, and I think that is a critical feature of the signal that is given by this legislation.

I am going to ask that the testimony that I have had prepared be introduced in the record, and I think that, as you say, I would like to summarize it very briefly.

Senator LAXALT. Your full statement has been made part of the record, as if delivered.

Mr. JENSEN. Thank you. It is a point of personal privilege to be here, and serving as assistant attorney general for many years in Alameda County, Calif. I did have an opportunity to be one of the original members of the National District Attorneys Association Commission on Victim-Witness, and I think there has been work done by that association that is important, and now it is a privilege for me to be here to present to you the views of the Department of Justice that I am confident will move this legislation forward.

It will be a significant improvement as far as legal criminal justice is concerned. At the outset, I would say that I am sure you are aware that there is a task force on victims of crime which has been put together by the signing of Executive Order 12360 on April 23, and that task force has been directed by the President to conduct a complete and thorough examination of the policies of National, State and local programs that affect victims of crime and to report on that issue to the President by October of this year.

I think that it is important to recognize that, because I think that has an impact upon this legislation. I may say, also, in that regard, that I think it should be stated for the record that the President has appointed Lois Herrington as chairman of that task force, and once again I know that she is qualified, and the product we can expect from that task force I think will be outstanding.

I may say as far as the legislation is concerned, because of the task force, I think we would recommend in two specific areas that the legislation be deferred until the report, because of the complexity and the area of coverage of the legislation, but that recognizing the urgency of the legislation, I think that we would be in direct support of going forward immediately regardless of the task force with specific areas of the legislation. Titles 1, 2, and 3 are such that in view of the hearings and the experiences that have already been articulated, we would support going forward with those immediately. That would be in the areas of victim impact statements

It makes no sense whatsoever not to have victim impact statements as part of the sentencing process.

Senator LAXALT. Is that is necessary to move forward with?

Mr. JENSEN. That is necessary to move forward on.

As far as title 2, this is for the protection of victims and witnesses, and it deals with sections 1512 and 1513 to be added to title 18 of the United States Code, and this would significantly improve the penalties for acts of harassment of witnesses. We would support the direct movement of that legislation.

As far as title 3 is concerned, we are dealing with an issue that was already alluded to with respect to restitution of victims of crime. This is important legislation, and we would support this moving forward. There is no reason that we should not have as a regular part of the sentencing process consideration and actual attention and national implementation to effect restitution of victims of crime.

Senator LAXALT. We are told, and correct me if I am wrong, that as far as the Federal system is concerned, and I suppose it applies to the State system, that while there presently is a requirement for the consideration of restitution that in the process it is widely ignored and not observed. Is there any reason for that?

Mr. JENSEN. I think your observation is correct. The reason is that there is no acceptance of responsibility. The court obviously needs the information to make the restitution order. I think there was a reference that the court or the probation officer simply didn't have the information. That is a failure of responsibility.

To my mind, where that responsibility should be placed is on the prosecutor. The prosecutor is in a position in the case, reviewing the evidence, to make that information available. You ought to have a regularized system where you gather in the information about property impact, about medical impact, about all of the restitution items that are there. That is simply a matter of building into your system a method of gathering that information, putting it into the flow where it is given to the court.

Senator **Laxalt**. This should all be in presentencing, I assume.

Mr. **Jensen**. It should be presentence, and should be a routine part of the case preparation.

Senator **Laxalt**. Our requirement is that a judge would be required to file a statement why he hasn't granted or ordered restitution. In the statement of Justice, the indication is that it would be a burdensome requirement. Do you really feel that way, as you say in your statement?

Mr. **Jensen**. It is in the testimony, I understand, but I think that could have been omitted. If I could strike that particular word, I would be happy to do that.

I will say, however, that imposing that responsibility is somewhat different in that there are any number of sentencing decisions that have to be gone into, and there is no current requirement that there be a statement in reference to those. It may very well be that that could be part of the sentencing structure.

In that sense, to impose that puts a new kind of requirement and accents the burden on the system, The real point is that we shouldn't be in a position where the judge says, "The reason I am not able to say anything about restitution is that I have no information."

There needs to be a system built so that that information flows through to the court. I think you must accept the responsibility, build the system, and gather that information. Is there any reason why you cannot communicate by mail or phone or personal contact with victims of crime, gather the information, and put it into the sentencing process? It is simply a matter of accepting the responsibility and building a system to do that. That is better to me than, at the end, imposing the necessity for a statement.

Senator **Heinz**. Then what about the idea that Chairman Laxalt mentioned, that there shouldn't be any parole until restitution is considered?

Mr. **Jensen**. Has been considered?

Senator **Heinz**. A condition that restitution be made.

Mr. **Jensen**. That would impose the ultimate kind of sanction on it, and you would delay the sentencing until the information was gathered. If that is the only way we can move the system, I would be in support of it.

Senator **Heinz**. That may be the best way.

Mr. **Jensen**. It may be. Once again, you look at the kinds of services and guidelines, and that is a part of this that is going to be addressed by the task force, and you build that as part of the systematic way in which you deal with victims and witnesses. That is the effective way, in my experience, to deal with these issues.

Senator Laxalt. Getting back to the educational process I spoke of before, do we have any program in the Department of Justice in which the U.S. attorneys and Federal judges we are confirming almost every week, can learn sensitivity to victims' rights? I suspect that we have none.

I have participated in several judicial conferences, and I don't recall any panels or programs in this area.

Mr. Jensen. I think there is a shortcoming in that regard. It is addressed in a crisis situation——

Senator Laxalt. Almost in passing.

Mr. Jensen. It comes up when the situation occurs. It came up that the statements being submitted to the Bureau of Prisons did not carry adequate information. Part of what will happen, though, there is something from the Attorney General's Task Force on Violent Crime, which specifically addresses the subject and says the lack you speak to needs to be addressed by the Department.

We also anticipate that the task force will be developing precisely those kinds of services that can and ought to be rendered by U.S. attorneys' offices. That will be built, then, into a system of formal distribution of guidelines, through the U.S. attorneys' manual and through an educational process.

We have programs with U.S. attorneys on a regular basis where that kind of education and sensitizing can occur.

Senator Laxalt. But presently it is not in place to speak of, is it?

Mr. Jensen. It is not in formal place now. It will be.

Title 4 and title 5, as my testimony points out, these are areas having to do with third-party liability, and with the other area with reference to civil liability in title 4, and with title 5 on guidelines.

Both of those are peculiarly within the task given to the task force. We suggest they be deferred. We agree with them totally in concept, these are areas that we have to move forward in, but I think the task force should be given an opportunity to look at them.

Senator Laxalt. Does the task force have the expertise to examine these areas, which are highly specialized? Are they going to be properly advised so they can give us recommendations?

Mr. Jensen. I believe so. From what has already been stated, I think the task force is well served by the appointment of the chairman. The persons who have been contacted to my knowledge at this point to serve on that task force, both as advisory members and as staff people, are very well qualified.

Frank Carrington serves on that, one of the figures in the country who is most knowledgeable about victims and particularly in the area of liability.

So I am confident that the expertise and experience is there, and the task force, once again, as I say, will have available work product as a result.

Senator Laxalt. Senator Heinz?

Senator Heinz. Mr. Chairman, first of all I want to commend Lowell Jensen for what I take to be a very supportive statement. I understand that his reservations are related more to process than substance, that he quite understandably feels here as the administration's representative that he does not want to preempt any of the work of the commission, and I think that is an understandable and laudable position.

At the same time, I am sure that none of his reservations, being as they are largely of a procedural nature, that he would not necessarily want to use them as the reason for the Congress not to act, if we saw fit. Is that correct?

Mr. JENSEN. Well, as I say, and you have said most specifically that with some reluctance, given the urgency of this legislation and the support of the Department of Justice and the administration for it, we ask that there be some deference to those specific areas.

I would hope that the track would be such that the work of the task force would come along contemporaneously in such a fashion that it would be available.

I think it is important, however, that before titles 4 and 5 move that the task force report be an actuality. In the other areas, we would be in support of legislation moving immediately. So with this reservation, I agree with your observation, Senator.

Senator LAXALT. Excuse me 1 second. They are required to report back October 1?

Mr. JENSEN. That is my understanding. I don't know October 1st—in October.

Senator LAXALT. That would be bobtail time as far as the Congress is concerned.

Well, we will be working social security at least, and perhaps it wouldn't be all that bad to work it later in the year.

But I must say that I would hope in terms of the priorities of the task force that they can address themselves on the front end to the problem of third-party liability and give us assistance here.

Mr. JENSEN. I know the task force is aware of these hearings and certainly will address your concern.

Once again, I appreciate the opportunity to be here.

Senator HEINZ. Mr. Chairman, I have one or two questions. My understanding is that the task force does not have to report until December 31, 1982.

Second, I do endorse your suggestion with respect to the third-party liability and with victim treatment guidelines, that anything they could do to report earlier on those, maybe have two reports or handle it in some way so they can get that information to us, their recommendations on an expedited basis, that would be helpful.

I think it is a very constructive suggestion you make. Having said that, I would like to ask Lowell Jensen, and this is with respect to the guidelines calling for fair treatment of victims of serious crime, title 5, is it not the case that the American Bar Association Victims Committee has done extensive work on perfecting these guidelines?

Mr. JENSEN. Yes; indeed, they have.

Senator HEINZ. I am going to ask you a series of questions, and I will give you plenty of time.

Is it not the case that many of the better local prosecutors' offices have already instituted these procedures?

Mr. JENSEN. No question about it.

Senator HEINZ. Is it not the case that on August 17, 1981, the Attorney General's task force on violent crime recommended that the Attorney General issue guidelines in this area?

Mr. **Jensen**. Yes.

Senator **Heinz**. And is it not the case, said the friendly prosecutor, that on page 88 it reads, "There have been a number of offices in this country, such as Lowell Jensen's former office in Alameda County, Calif., that have made tremendous progress in recognizing and attending to the problems of victims and witnesses"?

Mr. **Jensen**. It gives me some pride to plead guilty to that. [Laughter.]

Senator **Heinz**. Mr. Chairman, I think it may be possible, based on all the work that has gone before, if we make the judgment that the problem is so serious and urgent that it may be possible, I think, for us to do a good job in this area, and that title 5 need not necessarily have to wait until December 31, 1982.

Mr. **Jensen**. Senator, you are correct in the terms of the mandate for the task force. However, the anticipation is that because of the work that has been in existence, and there is a great body of work there, that it can be done by October.

Senator **Heinz**. Thank you.

Senator **Laxalt**. I thank you for coming in, Mr. Jensen. I must say as far as the committee is concerned, we feel we have a friend in court in the right place in Justice, because as Senator Heinz indicated, you did do very worthwhile work in this area in Alameda County.

We look forward to working with you.

Mr. **Jensen**. Thank you.

[The prepared statement of Mr. Jensen follows:]

PREPARED STATEMENT OF D. LOWELL JENSEN

Mr. Chairman and Members of the Subcommittee --

I appreciate this opportunity to appear today to set out the views of the Department of Justice regarding S. 2420, the Omnibus Victims Protection Act of 1982. This legislation seeks to strengthen existing protections for victims of federal crimes, a goal which this Administration fully supports. Although tremendous attention is focused upon the rights of criminal defendants, there is -- by comparison -- virtually no attention whatsoever paid to the victims of crime. This bill and this hearing today help to redress that problem by focusing national attention upon the human toll of crime and some of the steps which can be taken to be more responsive to crime victims.

As you know, on April 23 the President signed Executive Order 12360 establishing the Task Force on Victims of Crime. This Task Force has been directed by the President to conduct a thorough review of national, state and local policies and programs that affect victims of crime and to report on ways in which we can expand and improve efforts at all levels of government to assist and protect those who have been victimized by crime. We expect to have the final report of the Task Force by the end of October.

Because a Presidential Task Force will be examining the issue of victim protection and assistance in detail with a view toward development of specific legislative and administrative recommendations, we are reluctant to take any action which might have the effect of foreclosing options available to the Task Force. At the same time, we recognize that there is deep Congressional concern over shortcomings in existing federal laws relating to victims and that there is strong support for prompt action to remedy the most glaring defects in current law. As we do not wish to impede Congressional efforts to make needed improvements in the law, we have sought to identify those provisions of S. 2420 which can be processed now without undermining the work of the

Task Force and those where we believe action should be deferred until the Task Force report is received and analyzed. Generally, we believe that Titles I, II, III and VI of S. 2420 are areas where there is widespread agreement that legislation is needed and that legislative action of the type proposed in these Titles can and should be undertaken this year. With respect to Titles IV and V, it is our view that these proposals involve very complex matters and that the Congress should await the recommendations of the Task Force before proceeding.

Taking the provisions of S. 2420 in numerical order, the Administration supports Title I which proposes that Rule 32 of the Federal Rules of Criminal Procedure be amended to require that a victim impact statement be prepared and furnished to federal courts in connection with sentencing of criminal offenders. It seems self-evident that sentencing decisions should take into account the magnitude of the effect of the crime upon the victim or victims. The proposed amendment to Rule 32 -- by requiring that the sentencing court is provided with verified information as to the financial, social, psychological and medical impact of the offense upon the victim -- would help to insure that sentencing decisions take proper account of the effects of the criminal act for which the offender is being punished. This provision was incorporated within the Criminal Code Reform Act, S. 1630.

Title II of S. 2420 would make a series of improvements in existing federal laws relating to protection of victims, witnesses and informants. First, the bill would strengthen existing criminal laws which punish acts of intimidation and retaliation against victims, witnesses and informants. The new sections 1512 and 1513 to be added to Title 18, United States Code, incorporate the improvements in existing law recommended in sections 1323 and 1324 of the Criminal Code Reform Act, S. 1630. The purpose of and need for these improvements are set out in some detail in the Senate Judiciary Committee Report on S. 1630, Senate Report 97-307. In addition to protecting against acts of intimidation and retaliation, these new provisions would establish criminal penalties for acts of harassment and annoyance directed at victims, witnesses and informants carried out by criminal defendants or those in league with them.

Title II also would make needed improvements in the Witness Protection Act consistent with those proposed in section 3131 of S. 1630. Generally, the areas where improvements are needed involve expansion of the authority of the Attorney General to provide witness protection in cases other than those involving organized crime and to protect persons closely associated with witnesses as well as witnesses and their immediate families. This provision also gives the Attorney General greater discretion to tailor protective measures taken to the needs which arise in different cares. Furthermore, improvements in the Witness Protection Act would authorize federal protection, on a reimbursable basis, of State witnesses where protective measures which can be taken by the State are inadequate. Finally, Title II would authorize civil judicial actions to restrain those who pose a threat to victims and witnesses. This provision tracks section 4014 of S. 1630 and adds to the panoply of remedies available to the government and the courts to safeguard witnesses and victims.

As with Title I of S. 2420, we believe that the proposals in Title II are meritorious, have been studied at great length, and have virtually unanimous support. We feel, therefore, that the Congress can and should proceed to enact these needed improvements in the law without further delay.

Title III of S. 2420 deals with restitution to victims of crime. Consistent with section 2006 of S. 1630, Title III would provide for restitution as a separate sentence. Currently, in order to require a convicted defendant to pay restitution, the court must sentence the defendant to probation and then impose restitution as a condition of probation. We strongly agree that restitution should be a sentencing tool available in all criminal cases -- not only where sentences are probated. Some of the other provisions of Title III, however, are problematic. For example, the bill requires a judge to state in writing his reasons for not ordering a defendant to make restitution. This is a burdensome requirement and may well be unwarranted given the fact that today federal judges generally are under no obligation to state reasons in support of a particular sentence. In short, we support the basic concept of a new sentence of restitution but suggest the need for refinement with regard to some of the specific provisions of the bill. We would be pleased to work with the Subcommittee in reviewing these provisions.

Title III goes on to require the Attorney General to report to the Congress within six months of the date of enactment of the bill concerning laws necessary to insure just compensation of victims. As noted earlier, we anticipate that the issue of victim compensation will be one of the major points to be addressed by the Task Force on Victims of Crime. Since we fully expect to be coming forward in due course with recommendations concerning victim compensation once we have had an opportunity to receive and analyze the Task Force report, we believe this statutory report requirement is unnecessary and should be deleted from the bill.

Title IV of S. 2420 proposes to make the federal government civilly liable for injuries or property losses suffered at the hands of persons who escape or are released from federal custody where the government is found to have been "grossly negligent". Title V would require the Attorney General, within six months of enactment of the bill, to develop and implement guidelines to improve federal assistance to victims. The bill further sets forth nine "objectives" for consideration in the promulgation of such guidelines, including a variety of victim service programs such as notification to victims about certain stages of the criminal justice process, and the opportunity for consultation with the prosecutor. The proposals in both these titles of S. 2420 raise complex issues that are properly within the purview of the President's Task Force on Victims of Crime and as to which we believe it is wise to defer action pending examination of the Task Force's study and recommendations. Although seemingly simple, many difficult questions lurk with respect to these matters. Both the Department of Justice and, in our view, the Congress, would be better advised to obtain the benefit of the Task Force's analysis before proceeding further with any legislation in these difficult areas.

Finally, Title VI of S. 2420 proposes that the Attorney General report to the Congress within one year as to laws necessary to insure that no federal felon profits from the sale of the recollections of criminal exploits until such time as any victim of such criminal offenses receives restitution. We are supportive of the general thrust of this proposal and do not object to the report requirement.

In summary, Mr. Chairman, we support those provisions of Titles I through III which are consistent with the Criminal Code Reform Act of 1981, S. 1630. We also support the goal of Title VI. We recommend against action on Titles IV and V until the President's Task Force on Victims of Crime has had an opportunity to consider and report on the issues addressed in those sections of the bill.

Again, I appreciate the opportunity to appear today and will be pleased to attempt to respond to any questions that the Subcommittee may have.

Senator **Laxalt**. We have alluded to the testimony on third-party liability. I think now is the appropriate time for us to inquire into this general area, and we have available for testimony in this area Douglas Payton of Mobile, Ala., and Frank Carrington, president, Victims' Assistance Legal Organization.

Will you kindly step forward? Mr. Payton, Senator Heflin wanted to be here to introduce you to the committee as one of his constituents, and if you do not mind, I will read his statement.

Prepared Statement of Senator Howell Heflin

Mr. Chairman, it is a sincere pleasure for me to introduce a fellow Alabamian and a tremendously brave American, although I wish it were not necessary for him to be with us today.

Mr. Payton is a crane operator from Mobile, Ala., but it is not in that capacity that he appears here today. He is here representing the families and loved ones of all the persons who have been brutally taken from us.

In late 1976, Mr. Payton's wife was brutally murdered by a paroled felon. In the 6 years since, Mr. Payton and his two sons have made a valiant attempt to rebuild their lives, but after such an awful and tragic event that is certainly a difficult task.

Being here today takes a great deal of courage on Mr. Payton's part, but I know it will be of great help not only to this committee but to numerous other people throughout the country.

We certainly welcome you here, Mr. Payton. We certainly welcome an old friend of this cause, Frank Carrington.

Senator **Heinz**. Mr. Chairman, before they begin, may I say that we, too, want to express our gratitude to Mr. Payton for being here. His is, I think, an absolutely classic case for us to look at as we address the issue of third-party liability. I say that at this point because I unfortunately have another senatorial responsibility I must discharge, and I will not be able to stay for Mr. Payton's testimony, which I have read and reread with some horror and with some great, tremendous feeling of debt to Mr. Payton for being here with us.

So I directly have to excuse myself, but I had hoped we would have been able to take you, earlier, but I have an 11 o'clock meeting in another committee over in the Capitol that I have to attend.

I do not serve on the Judiciary Committee, and I should have asked Senator Laxalt, knowing his influence, to get all my other meetings rescheduled.

Senator **Laxalt**. You should have asked.

It has been a pleasure to work with you. I know this is an experience that is intimidating. May I tell you as chairman of the committee that you are among friends. Stay relaxed, and tell us your story.

STATEMENTS OF DOUGLAS PAYTON, MOBILE, ALA., AND FRANK CARRINGTON, PRESIDENT, VICTIMS' ASSISTANCE LEGAL ORGANIZATION (VALOR)

Mr. **Payton**. First of all, if I may, I want to put this up. You can see. I want to show you. This is my wife. Now, I believe you have seen this, and I believe you should see this, that I have to show you, if I may. I will bring it to you myself.

Senator **Laxalt**. All right. These are pictures.

Mr. **Payton**. These are pictures of my family the way they were at the time. I will explain to you the way they are now.

Senator LAXALT. Let the record indicate that the witness has presented to the committee various photographs including his deceased wife, lying in state, and pictures of the funeral, pictures of his children.

These can be made available, if you wish, to members of the committee so that they will be able to grasp the complete significance of your very tragic story.

Mr. PAYTON. The reason I brought these pictures is, I need to point out to you people, you need to know and see, yourselves, the type of anguish and hell that society has to go through because of the negligence of the Federal Government.

Thomas Whisenhant was sentenced to 20 years in the Federal penitentiary by a Federal judge. He was paroled—his sentence was reduced to 10 years, and I think he stayed, altogether I think it was either 6½ years or 13 years.

OK. At this time, they analyzed this person, psychiatrists, and said this man was a psychotic maniac. The Government knew this. They had papers showing this. I have papers showing this.

They discussed with this man, if they turned him back out on society again, the doctor said he would kill again, and again, and again, and again.

Senator LAXALT. Tell me, during the time after he was sentenced for the murder of your wife and they were giving consideration to releasing him, were you contacted at all, or did you simply keep track of the case?

Mr. PAYTON. I am sorry? You will have to repeat that.

Mr. CARRINGTON. Mr. Chairman?

Senator LAXALT. I see it. That is when this happened.

Mr. CARRINGTON. The murder of Mrs. Payton took place subsequent to the release of Whisenhant. He was doing 20 years for atrocious assault. Then they released him after 6½ years, and that is when the triple murders took place.

Senator LAXALT. I see. Proceed, Mr. Payton.

Mr. PAYTON. What I am trying to say was that the Federal Government had this man's records. From what I hear, and from what I have talked about with different law officers, these records are sent up to the parole board within 3 to 6 months in advance to be reviewed before they release a Federal prisoner.

Now, surely, surely to God, these people saw this man's records, saw the type of animal that this person was.

Yet, how, I don't know, that is why I am here today, but how, I don't know how the Federal Government released a person like this on society, knowing that he was a maniac, a homicidal maniac.

I don't understand it. The Government owes me an answer, not personally me, but my children. They owe my children deeply.

At the time, my kids were 4 and 6 years old.

Senator LAXALT. How old are they now?

Mr. PAYTON. They are 9 and 11, and they don't know the facts, how their mother was murdered and raped and mutilated. They don't know the facts.

You tell me how I can tell them, how I can have anyone tell them. There is no way. My youngest son at the time, if you could have seen him before and see him now, you would understand what I am trying to say, what I am trying to tell you. He has seen a psychiatrist, he has completely thrown himself into a shell, and to this day I haven't toid them about their mother, but I am going to tell them. After they see this, if it doesn't hurt them or damage them further than it already has. I mean, you can't hurt me no more than the Federal Government has already hurt me.

My children are my main concern, and they can't hurt me no more, but they can cause a great deal of damage to my children and her family, and to other people, and these types of situations—I think it is due time that the public and society can fight back and set their teeth in the Federal Government just like the Federal Government reaches out and takes what they want.

It is due time that something be done about this. I have lived 6 years, 6 years of anguish and hell. Have you ever waked up at night holding your kids and have them asking, "Where is my mother?" and screaming and crying? Let me tell you, I have. I have walked through many a day of hell over this, and I will walk many a day more to get something done about it.

I feel the Federal Government was deelpy wrong, grossly negligent, in this situation concerning this case. I feel that they owe my children many, many more—a great deal more—than what I have sued the Government for, because one thing is for sure, as a fact: This will never, never, never bring their mother back to them.

It was the Government's fault. They made a mistake. They need to pay, just like anybody else, for the mistake they made.

Senator LAXALT. Irrespective of all that, and there is a clear case of negligence, what appears to be negligence at least on the part of the Federal Government, but you have been left without any civil remedy. Is that true? You have no remedy. Unless this law is passed, apparently you would have great difficulty, if not near impossibility, in being compensated. Is that true, Mr. Carrington? Why don't you speak to that?

Mr. CARRINGTON. Mr. Chairman, the situation of the *Payton* case now is Mr. Payton sued the Federal Government for gross negligence in the release of Whisenhant. I think basically his case would have been one of the strongest ever made.

However, the U.S. district court threw the case out because of the doctrine of sovereign immunity. It then went to the fifth circuit, which has since split up, and the three-judge panel ruled unanimously that they recognized the doctrine of sovereign immunity, but they said it only comes in where the act that claims to be immune was discretionary.

The fifth circuit said the negligence in this case was so gross, the record they had on Whisenhant said he would kill a woman if he got out. While he was in prison, the only time he came in contact with a woman, a prison employee, he attacked her. The negligence was so gross that the act in releasing him could not be called discretionary.

Therefore, they said sovereign immunity is not applicable. The Government suggested a rehearing en banc and it was reheard in September before the old fifth circuit, and we still don't have a decision on it. Technically, he has a remedy, but we don't know what the court is going to do.

Senator LAXALT. Is there any provision in any of the Federal process of providing a remedy, or is this a case of first impression?

Mr. **Carrington**. If you recall, Senator, when Mr. Everly was working for you, you introduced a bill which is in essence what the provisions of title IV were.

There have been Federal cases, *Summer* v. *Psychiatric Institute,* and *Reiser* v. *The District of Columbia,* where a remedy was found for gross negligence, but in each of these cases the courts, I think, much as did the fifth circuit in the *Payton* case, worked around the doctrine of sovereign immunity, and I think that the legislation is so essential, I think we should foreclose having to go to the courts and just amend the Federal Tort Claims Act so that gross negligence in release, or escape or failure to supervise the prisoners, will give rise to a cause of action against the Government.

Senator **Laxalt**. In the face of a history where this man was obviously a homicidal maniac, a complete psychotic, how in the world in the face of that kind of testimony could the parole people think in terms of turning him loose on society?

Mr. **Carrington**. It isn't in the record, Senator.

It is very difficult to come in and in hindsight criticize parole board officials, because I think they are dedicated, but in this case the negligence was so gross that there is no explanation.

Senator **Laxalt**. Has none been offered by the authorities at all?

Mr. **Carrington**. No; the position of the Government in appealing the case is almost on policy grounds that if we hold the parole board liable on this, we can't get anybody to serve on the parole board, and I think that is nonsense because, you know, if somebody is asked to serve on a parole board and is afraid of the consequences of gross negligence and, remember, we are keeping this in the context of gross negligence, then he doesn't have any business being on the parole board anyway.

Primarily, the Government is arguing policy, and I think their argument—I think this argument is without merit.

Senator **Laxalt**. What about personal liability in a case like this?

Mr. **Carrington**. I would suggest personal liability in a case where there is criminal conduct, such as selling paroles. The Governor of Tennessee did that.

I think the gross negligence standard where the Government is substituted as defendant, that that protects the Government and does not involve second-guessing of routine cases.

If they parole a fifth offender check forger who has never committed a violent crime and he then committed one, in that type of case I don't think it would subject the Government to litigation.

Senator **Laxalt**. We don't think so, either.

Mr. Carrington, you have been involved in this effort as long as anybody I know, going back when we were working with a compensation act. You had an opportunity to review our proposed legislation, and we have your prepared statement, which will be filed in the record for review by the committee.

Do you have any summary with respect to the legislation?

Mr. **Carrington**. Very briefly, Mr. Chairman, to state for the record that I represent the Victims' Assistance Legal Organization in Virginia Beach, Va., which is basically a clearinghouse for information and research and so on for lawyers who are filing lawsuits on behalf of victims.

Our acronym is Valor [Victims' Assistance Legal Organization], and in behalf of Valor we unreservedly endorse every provision of S. 2420, and if I may take the liberty to commend you and Mr. Heinz and your staff, Mr. Nash and Ms. Hinton and others, for the tremendous initiative you are taking in the victims area, I would do so.

Senator LAXALT. We think it is long overdue. We appreciate your sentiments and support throughout.

I think it would be appropriate, and I think both of you would agree, that we make part of this record the fifth circuit decision. That should be made available, it seems to me, to my colleagues so they will have a full flavor of the problems you have encountered.

I think that should be a vital part of this. I will order that the fifth circuit decision as previously reported and printed be made part of this record. And there is, I think, the amicus brief in connection with the particular situation, and I think we should order that filed as well.

Mr. CARRINGTON. Thank you, Mr. Chairman.

Senator LAXALT. Mr. Payton, do you have anything more to offer?

Mr. PAYTON. Yes, sir. I want to show the cover of this magazine. I don't know about all of it, but I want to show you this. This is a picture of Mr. Gradick, general States attorney of Alabama, with a picture of Whisenhant and a picture of some gentleman carrying my wife out of a field. This is in a detective magazine which was written and sketched without my knowing about it at all, within a few days after this happened.

This caused a great deal of hurt.

Senator LAXALT. I can well imagine. We have a copy of it here.

Mr. PAYTON. If you have read it and have seen how it is labeled. My children haven't seen this, but they could see it.

Senator LAXALT. Yes; we have a copy of it, and we will certainly make that available to members of the committee as well.

Do you have anything else, sir?

Mr. PAYTON. I just want to stress the point that if this law could have been then, none of this would ever have happened. If the Federal people would have stood behind and endorsed the law, as they wrote it out themselves, none of this would have happened.

I have been in and out of courts tearing an old wound open over and over and over again. You can imagine what it has done to me. My children go up and down, up and down, and it is pure hell.

The Government was wrong. They were negligent in this situation, and they need to be burnt. That is the way I feel. I will be honest with you. This case needs like when a judge takes a man on a first charge, he is going to make—how will I put it, a——

Senator LAXALT. That is all right. Just rephrase it.

Mr. PAYTON. When a Federal judge takes a person the first time for doing something, and he wants to make an example before everybody, and he sentences him for it, and punishes him severely for it, this case should be made so that the Federal Government is an example.

I feel the public would feel the same way, in this negligence, because there is no way I could see they could overlook a man's situation in this case.

I thank you for your time, and I thank the people who helped me come up here, because I had a lot of things on my mind.

Senator LAXALT. You have made a material contribution to the deliberations of this committee.

Once again, I thank you for coming here. I know it has been difficult for you. It has been difficult in the past. I might say to you that if we are able to pass this kind of legislation, perhaps we can forestall completely someone like you having to come back under comparable circumstances. That is what this bill is all about. It is directed not only to the victims, but also to the survivors of the victims, you and those two youngsters.

I hope before this is all done that we will be able to pass this legislation and save some innocent family out there from the kind of anguish that you have had to undergo yourself.

Thank you for coming.

Mr. PAYTON. Thank you.

[The prepared statements and submissions of Mr. Payton and Mr. Carrington follow:]

PREPARED STATEMENT OF DOUGLAS PAYTON

I AM DOUGLAS PAYTON FROM MOBILE, ALABAMA, WHERE I WORK AS A CRANE OPERATOR. I DECIDED TO COME HERE TODAY BECAUSE OF MY FAMILY; I HAVE WAITED A LONG TIME FOR A CHANCE TO TELL MY STORY AND THE THINGS THIS CRIME DID TO MY CHILDREN. MY WIFE, CHERYL, WAS RAPED, MURDERED AND BUTCHERED 6 YEARS AGO BY A MAN WHO WAS LET GO BY THE GOVERNMENT EVEN THOUGH THEY KNEW HE WAS CRAZY.

WHEN I WAS ASKED IF I WAS WILLING TO COME HERE TO TELL MY STORY, THAT NIGHT I SAT DOWN AND WROTE TEN PAGES OF THINGS I WANTED TO SAY. BECAUSE I KNOW YOUR TIME IS SHORT, I WILL TRY AND TELL YOU WHAT I CAN.

MY CHILDREN ARE MY MAIN CONCERN. THEY WERE ONLY 4 AND 6 WHEN THIS HAPPENED. WHEN I FIRST GOT THE CALL FROM THE DETECTIVE TELLING ME TO COME DOWN TO THE STORE BECAUSE SOMEONE HAD TAKEN MY WIFE, I THOUGHT HE WAS KIDDING. I WAS LIVING IN A TRAILOR AT THE TIME. THAT NIGHT I HAD BEEN WATCHING TV WITH THE KIDS, WHILE CHERYL WAS AT WORK AT A CONVENIENCE STORE. SO I TOOK THE KIDS IN THE CAR WITH ME. WHEN WE GOT THERE, THE FLASHING LIGHTS WERE ON AND THE POLICE WERE EVERYWHERE THE OLDEST BOY STARTS TO SCREAM, "I TOLD YOU SHE WAS GONE." THE BABY JUST STARTED TO CRY. I HAD TO LEAVE THEM IN THE CAR. I CAN STILL SEE THEIR FACES IN THE CAR. WELL I FOUND OUT SHE HAD BEEN TAKEN. FOR THREE DAYS I DIDN'T SLEEP OR EAT. A FRIEND TOOK OFF FROM WORK AND DROVE ME AROUND LOOKING FOR HER. WE KNEW THIS GUY HAD HER BUT WE DIDN'T KNOW WHETHER SHE WAS HURT OR NOT. THEY HAD LOTS OF PEOPLE AND HELICOPTERS LOOKING FOR HER. ON THE THIRD DAY THEY FOUND HER IN A FIELD. HE HAD MOVED HER TWO TIMES; EACH TIME HE MOVED HER HE WOULD GO BACK AND CUT ON HER. THEY FINALLY KNEW WHERE HE WAS IN SOME WOODS. HIS MOTHER AND WIFE CAME TO TELL HIM TO COME OUT. HIS WIFE HAD THE RING AND WATCH ON OF THE FIRST WOMEN HE KILLED.

RIGHT AFTER THEY CAUGHT HIM, THE DETECTIVES TOOK ME HOME. A LOT OF RELATIVES WERE THERE; SHERYL'S MOMMA AND DADDY

WERE THERE. I WAS IN ANOTHER WORLD; BUT I HAD HAD TO TELL THEM SHE WAS DEAD. MY FAMILY HAS ALL STUCK TOGETHER ON THIS. THEY WENT WITH ME TO COURT AND ALL, BUT MY MAIN WORRY IS STILL MY TWO BOYS. MY YOUNGEST SON IS NOW 9 YEARS OLD AND HE IS SEEING A DOCTOR -- HE IS ALL CLAMMED UP. MY OLDER BOY GOES TO PIECES EVERYTIME SOMEONE MENTIONS HIS MOTHER'S NAME. I GOT A CALL FROM THE YOUNGEST BOY'S TEACHER WHO SAID, "I DON'T KNOW WHAT IS WRONG WITH HIM." I TOLD HER, "WELL YOU KNOW WHAT HAPPENED, DON'T YOU?" AND SHE SAID "YES, BUT HE OUGHT TO BE ABLE TO COPE." HOW DOES ANYONE EXPECT SOMEONE WHO WAS JUST FOUR WHEN HIS MOTHER WAS RAPED, MURDERED AND BUTCHERED, TO COPE?

I STAYED HOME A YEAR AFTER IT HAPPENED TO BE WITH THE BOYS. I JUST COULDN'T WORK. I HAD TO LIE TO THE BOYS AT FIRST AND TELL THEM THEIR MAMA WAS IN THE HOSPITAL WITH A BROKEN ARM BUT THEN I FINALLY TOLD THEM THEIR MAMA WAS DEAD THAT JUSUS TOOK HER BECAUSE HE NEEDED HER MORE. TO THIS DAY I HAVEN'T BEEN ABLE TO TELL THEM WHAT REALLY HAPPENED. THEY HOLD THIS AGAINST ME BUT HOW DO YOU TELL THEM WHAT HAPPENED? I KNOW THEY FOUND OUT ABOUT THE DETAILS FROM FRIENDS AND SOME BOOK WHICH WROTE UP THE CRIME WITHOUT EVEN ASKING ME IF IT WAS OKAY. BUT I STILL CAN'T TALK TO THEM ABOUT IT.

I HAVE SOME PICTURES HERE OF MY BOYS AND THEIR MOTHER AND THEN AT HER GRAVE. I THOUGHT OF BRINGING SOME OF THE PICTURES OF HER ALL CUT UP, BUT DIDN'T. WHEN I FIRST SAW THE PICTURE IN THE ATTORNEY'S OFFICE I DIDN'T KNOW WHO IT WAS -- I JUST SAY, "GOD, WHO WOULD DO THIS TO THIS POOR WOMAN?" I DIDN'T FIND OUT UNTIL THE TRIAL WHEN I WAS ON THE STAND THAT THOSE PICTURES WERE ACTUALLY MY CHERYL AFTER HE HAD FINISHED WITH HER.

TO LET YOU KNOW HOW BAD THIS WAS ON THE KIDS, THE CHRISTMAS AFTER IT HAPPENED, I SPENT A LOT OF MONEY ON THE KIDS, BUYING THEM PRESENTS. IT WAS JUST HEART BREAKING WHAT HAPPENED. THEY

GOT UP LATE, THEY DIDN'T TAKE ANY INTEREST IN THEIR PRESENTS; THEY JUST SAT THERE.

I HAVE SUED THE FEDERAL GOVERNMENT BECAUSE I KNOW THEY WERE RESPONSIBLE FOR CHERYL'S TERRIBLE DEATH AND THAT THE FEDERAL GOVERNMENT ISN'T ANY DIFFERENT THAN ANYONE ELSE; IF THEY ARE WRONG, ANYONE OUGHT TO BE ABLE TO SUE THEM. THE PAROLE BOARD THAT LET HIM OUT DID AN AWFUL, IGNORANT, FOOLISH THING. THEY JUST TURNED THEIR BACK ON SOCIETY, THEY JUST DIDN'T CARE ABOUT THE PUBLIC. THEY KNEW ABOUT HIM AND WHAT HE MIGHT DO AND THEY LET HIM OUT ANYWAY.

I KNOW MY BOYS AND I WILL NEVER GET OVER WHAT HAPPENED. I HOPE BY COMING HERE TODAY, I HAVE HELPED OTHERS BECAUSE AT LEAST THAT MIGHT MAKE ME FEEL BETTER.

Douglas Glynn PAYTON, Administrator of the estate of Sheryl Lynn Payton, deceased, et al., Plaintiffs-Appellants,

v.

The UNITED STATES of America, Defendant-Appellee.

No. 79-2052.

United States Court of Appeals,
Fifth Circuit.
Unit B

Feb. 2, 1981.

Murder victim's husband and children brought a suit under the Federal Tort Claims Act, alleging that a federal prisoner guilty of attacking or ravishing multiple females of all ages was released from custody in total disregard of extensive medical reports confirming him as a homicidal psychotic, and that, shortly thereafter, he brutally beat, murdered and mutilated three females, including plaintiffs' wife/mother. The United States District Court for the Southern District of Alabama, at Mobile, Virgil Pittman, Chief Judge, 468 F.Supp. 651, dismissed for lack of jurisdiction, and plaintiffs appealed. The Court of Appeals, Fay, Circuit Judge, held that the alleged conduct by personnel of the United States Board of Parole and the United States Bureau of Prisons did not come within the "discretionary function" exemption of the Federal Tort Claims Act, and the allegations of the complaint stated a valid claim for relief under the Act.

Reversed and remanded.

1. United States ⇐78(12)

In suit which alleged that a federal prisoner guilty of attacking or ravishing multiple females of all ages was released from federal custody in total disregard of extensive medical reports confirming him as a homicidal psychotic and that, shortly thereafter, he brutally beat, murdered and mutilated three females including plaintiffs' wife/mother, the alleged conduct by personnel of the United States Board of Parole and the United States Bureau of Prisons did not come within the "discretionary function" exemption of the Federal Tort Claims Act, and the allegations of the complaint stated a valid claim for relief under the Act. 28 U.S.C.A. §§ 1346(b), 2671-2680, 2680(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. United States ⇐78(2)

By enacting the Federal Tort Claims Act, Congress authorized a limited waiver of sovereign immunity in tort actions. 28 U.S.C.A. §§ 1346(b), 2671-2680.

3. United States ⇐78(12)

In determining whether conduct comes within the "discretionary function" exemption of the Federal Tort Claims Act, court should review the nature of the loss imposed by the governmental injury, should assess the nature and quality of the governmental activity causing the injury, and should consider whether the vehicle of a tort suit provides the relevant standard of care, be it professional or reasonableness, for evaluation of the governmental decision. 28 U.S.C.A. § 2680(a).

4. Pardon and Parole ⇐4

United States Parole Board's discretion to release is limited both by the threshold time-served eligibility criteria and the duty to establish "a reasonable probability that such prisoner will live and remain at liberty without violating

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the laws" and to form an opinion that "such release is not incompatible with the welfare of society." 18 U.S.C.A. §§ 4202, 4203(a).

5. Pardon and Parole 🔑4

Release of a prisoner in total disregard of his known propensities for repetitive brutal behavior is not an abuse of discretion by the Parole Board but, rather, an act completely outside of clear statutory limitations. 18 U.S.C.A. §§ 4202, 4203(a).

6. United States 🔑78(12)

Choices involved in applying parole guidelines and releasing a particular person, whether characterized as "operational," "day-to-day" or by some other label, do not achieve the status of a basic policy evaluation and decision, and such parole board decisions, if negligent, are not protected by the Federal Tort Claims Act's "discretionary function" exemption. 28 U.S.C.A. §§ 1346(b), 2671–2680, 2680(a).

7. United States 🔑78(9)

While perhaps a high level allocation of manpower and financial resources or some other clear policy oriented decision may exempt the government from liability in particular cases, the alleged facts of the instant case, involving the brutal beating, murdering and mutilation of three females by a federal prisoner who was released from custody in total disregard of extensive medical reports confirming him as a homicidal psychotic, provided an insufficient basis for dismissal due to social, political or economic policy implications. 28 U.S.C.A. §§ 1346(b), 2671–2680, 2680(a).

8. Prisons 🔑9

Duty of the United States Bureau of Prisons to provide adequate and complete records for parole determinations is ministerial and not policymaking in nature.

9. United States 🔑78(12)

Once government officials decide to provide psychiatric treatment, the "discretionary function" exception of the Federal Tort Claims Act no longer shields them from liability for the negligent provision of such medical services. 28 U.S.C.A. § 2680(a).

10. Prisons 🔑13(5)

Discretion of the Attorney General and prison officials to classify and segregate prisoners is not unbounded.

Appeal from the United States District Court for the Southern District of Alabama.

Before JONES, FAY and HENDERSON, Circuit Judges.

FAY, Circuit Judge:

[1] It is alleged that a federal prisoner guilty of attacking or ravishing multiple females of all ages was released from custody in total disregard of extensive medical reports confirming him as a homicidal psychotic and that shortly thereafter he brutally beat, murdered and mutilated three females including appellants' decedent. Relief is sought by the victim's husband and children against both prison and parole officials. The trial court, 468 F.Supp. 651, dismissed for lack of jurisdiction. We reverse.

The question presented is whether or not the alleged conduct by personnel of the United States Board of Parole and the United States Bureau of Prisons comes within the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671–2680 (1976) (FTCA) or is exempt as a "discretionary function" pursuant to 28 U.S.C. § 2680(a) (1976). We conclude that section 2680(a) is not applicable and that the allegations state a valid claim for relief under the FTCA.

I.

Appellants allege and we accept as true on a motion to dismiss, *see Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980), that in 1977 Thomas Warren Whisenhant was convicted of the brutal murder and mutilation of Sheryl Lynn Payton, the appellants' decedent. This murder was not the first violent crime for Thomas Warren Whisenhant.

In 1966, as a member of the United States Air Force, Whisenhant was sentenced to twenty years in federal prison on a charge of assault with intent to murder arising out of the severe and brutal beating of a female member of the Air Force. Prompt medical attention saved the life of this initial victim. While serving his sentence Whisenhant manifested his continued homicidal tendencies by threatening the life of the only female with whom he came in contact, an employee of the federal penitentiary at which he was incarcerated. During this time period he was repeatedly diagnosed as psychotic and described as suffering from schizophrenia, paranoid type. His mental condition was noted as aggressive, chronic, severe, and manifested by brutality and assaultive behavior. Further, in 1968 one prison psychiatrist concluded that Whisenhant was in dire need of long term psychiatric treatment which he did not receive. Despite all of these warning signals, Whisenhant's sentence was reduced to ten years in 1970 and he was granted parole on November 28, 1973.[1]

Subsequent to parole Whisenhant brutally beat and murdered, on November 21, 1975, Ms. Patricia Hitt in Mobile, Alabama. On April 16, 1976, he kidnapped and murdered Mrs. Venora Hyatt also in Mobile, returning the next day to brutally mutilate the body.[2] Finally, on October 16, 1976 he kidnapped, raped and murdered appellants' wife/mother, returning to brutally mutilate her body in a manner similar to that of Mrs. Hyatt. Whisenhant confessed to all of these actions.

During Whisenhant's trial for the murder of appellants' decedent a psychiatrist who had examined Whisenhant's records testified that appellee's treatment of Whisenhant as a rational criminal rather than as a mental patient was contrary to elementary knowledge about psychotic behavior. Specifically, he testified that Whisenhant's behavior should have been recognized as nonspecific and intrapsychic and therefore repetitive and that as a homicidal psychotic his release on parole was grievous error bordering on gross negligence.

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[1] The complaint also alleges that Whisenhant's criminal records available prior to parole included a charge for assaulting a fourteen year old girl with intent to ravish in May, 1973 and his possible involvement in the murder of an elderly woman also in 1973. How these events occurred while Whisenhant was in federal custody is not clear.

[2] The complaint alleges:

> On April 17, 1976, said Whisenhant returned to where he had left Mrs. Hyatt's body and brutally mutilated said body as follows: there were nine (9) stab wounds just above the heart area; the abdomen was slashed open; the thighs were slashed through their entire length; the throat was cut, the larynx was severed; the vagina was cut by two (2) lateral incisions, each six (6) inches long; the labia was severed from the pubis; and both breasts were fully amputated.

Record, at 2.

Appellants filed the standard administrative forms with appellee claiming damages for the death of Mrs. Payton and in the absence of final disposition after six months, in accordance with 28 U.S.C. § 2675(a) (1966),[3] that claim was withdrawn and this action instituted. The complaint avers that the negligent reduction of Whisenhant's sentence by appellee, United States Parole Board, and the subsequent negligent decision to release and parole Whisenhant by the Board, due to the Board's failure to acquire and read the records indicating his murderous propensities or in disregard of these propensities, proximately caused Mrs. Payton's death and appellants' injuries. It alternatively avers that the Parole Board's negligence in failing to make adequate provisions for, or the negligent carrying out of, continued treatment and supervision of Whisenhant after parole was the proximate cause of appellants' injuries. Appellants also aver that appellee, United States Bureau of Prisons, negligently failed to have Whisenhant confined in a mental institution until restored to sanity or until his entire twenty year sentence was completed in accordance with 18 U.S.C. § 4241 (1976),[4] and further that prison authorities negligently provided improper psychiatric treatment for Whisenhant. Finally, the complaint avers that appellee, Bureau of Prisons, negligently failed to provide the United States Parole Board with all pertinent records prior to the time of Whisenhant's release and parole, which failure resulted in the improper parole decision.

II.

[2] By enacting the FTCA Congress authorized a limited waiver of sovereign immunity in tort actions. The statute confers jurisdiction upon the federal district courts with respect to

> claims against the United States, for money damages . . . for injury or loss

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[3] 28 U.S.C. § 2675(a) (1966) provides:

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

[4] 18 U.S.C. § 4241 (1970) provides:

> A board of examiners for each Federal penal and correctional institution shall consist of (1) a medical officer appointed by the warden or superintendent of the institution; (2) a medical officer appointed by the Attorney General; and (3) a competent expert in mental diseases appointed by the Surgeon General of the United States Public Health Service.
>
> Such board shall examine any inmate of the institution alleged to be insane or of unsound mind or otherwise defective and report their findings and the facts on which they are based to the Attorney General.
>
> The Attorney General, upon receiving such report, may direct the warden or superintendent or other official having custody of the prisoner to cause such prisoner to be removed to the United States hospital for defective delinquents or to any other institution authorized by law to receive insane persons charged with or convicted of offenses against the United States, there to be kept until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence, without deduction for good time or commutation of sentence, shall have been served.

> of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable . . .

28 U.S.C. § 1346(b) (1976). Excluded from this broad grant of jurisdiction is

> [A]ny claim based upon an act or omission of an employee of the Government exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1970). However, the Act does not provide a definition of "discretionary function." We must turn, therefore, to judicial interpretation and the FTCA's legislative history for its meaning and develop an appropriate analytical framework which is applicable not only to the facts of this action but to the broad spectrum of such governmental activities.

The parties agree that the seminal decision construing the exception is *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). This action was brought under the FTCA for personal injuries and deaths resulting from the cataclysmic explosion in Texas City, Texas of nitrate fertilizers manufactured by the government in surplus ordnance plants for shipment to occupied Europe. The findings of causal negligence fell roughly into three categories–carelessness in drafting and adopting the fertilizer export plan, negligence in manufacturing the fertilizer and dereliction of duty in failing to police shipboard loading.[5] *Id.* at 24, 73 S.Ct. at 962. The Supreme Court rejected these claims holding that the government's actions were protected as discretionary functions. *Id.* at 42, 44, 73 S.Ct. at 971, 972.

After reviewing the legislative history, the *Dalehite* Court determined that § 2680(a) was drafted as a clarifying amendment to assure protection for the government against tort liability for administrative or regulatory policy errors while allowing relief for run-of-the-mill tortious conduct of government employees and agents.[6] *Id.* at 26–27, 28 n.19, 73 S.Ct. at 963, 964 n.19. Therefore, the majority concluded that

> [t]he "discretion" protected by the section is not that of the judge–a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one's judgment of the best course, a concept of substantial historical ancestry in American law.

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[5] Negligence was also alleged regarding the Coast Guard's handling of the fire once it started. *Id* at 42 43, 73 S.Ct. at 971.

[6] One paragraph which appears time and time again in committee reports on the FTCA explains the proposed exemption:

> "The first subsection of section 402 exempts from the bill claims based upon the performance or nonperformance of discretionary functions or duties on the part of a Federal agency or Government employee, whether or not the discretion involved be abused, and claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation, whether or not valid. This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of any Government agent is shown,

Id. at 34, 73 S.Ct. at 967. In amplification the Court went on to state that:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

Id. at 35–36, 73 S.Ct. at 967–968.

While this language certainly permits an extremely broad interpretation of the application of the exemption, it has been limited by subsequent decisions which favor deeper analysis. As so ably put by Judge Goldberg:

> The description of a discretionary function in *Dalehite* permits the interpretation that any federal official vested with decision-making power is thereby invested with sufficient discretion for the government to withstand suit when those decisions go awry. Most conscious acts of any person whether he works for the government or not, involve choice. Unless government officials (at no matter what echelon) make their choices by flipping coins, their acts involve discretion in making decisions.
>
> If the Tort Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents in which government officials were driving, the federal courts must reject an absolutist interpretation of *Dalehite* . . . .

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and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies. Thus, section 402(5) and (10), exempting claims arising from the administration of the Trading With the Enemy Act or the fiscal operations of the Treasury, are not intended to exclude such common-law torts as an automobile collision caused by the negligence of an employee of the Treasury Department or other Federal agency administering those functions."

H.R.Rep. No. 2245, 77th Cong., 2d Sess., p. 10; S.Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H.R.Rep. No. 1287, 79th Cong., 1st Sess., pp. 5–6; Hearings before House Com. on Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., p. 33. *See* 346 U.S. at 29–30 n.21, 73 S.Ct. at 964–65 n.21.

Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967).

One of the first analytical approaches utilized by the Courts was suggested in *Dalehite* as the "planning level–operational level" distinction. *Id.* at 42, 73 S.Ct. at 971. *See Indian Towing Co. v. United States*, 350 U.S. 61, 64, 76, 76 S.Ct. 122, 124, 130, 100 L.Ed. 48, 53, 59 (1955).[7] This approach obviously looks to the level at which the activity complained of took place as being indicative of the proper result. *See Fair v. United States*, 234 F.2d 288, 293 (5th Cir. 1956); *Cohen v. United States*, 252 F.Supp. 679, 687 (N.D.Ga. 1966), *rev'd on other grounds*, 389 F.2d 689 (5th Cir. 1967); *Fleishour v. United States*, 244 F.Supp. 762, 766 (N.D. Ill. 1965), *aff'd*, 365 F.2d 126 (7th Cir.), *cert. denied*, 385 U.S. 987, 87 S.Ct. 597, 17 L.Ed.2d 448 (1966).[8] Unfortunately such a standard is conclusionary and does not really aid the process. Rather,

> [i]t may be a makeweight in easy cases where of course it is not needed, but in difficult cases it proves to be another example of a distinction "so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." Mr. Justice Frankfurter for the Court in *Indian Towing, supra*, 350 U.S. at 68, 76 S.Ct. at 126, 100 L.Ed. at 55. Such nonstatutory "aids" to construction tend to obscure, to limit, or even to replace the standards whose meaning they are supposed to clarify. [citations omitted] It must be remembered that the question at hand here is the nature and quality of the discretion involved in the acts complained of.

Smith v. United States, 375 F.2d at 246. On the strength of this conclusion, we must look deeper into the purposes expressed by the FTCA to extract the sense of the matter and upon this attempt to build a workable standard.

In developing a practical analytical framework for determining the nature and quality of the discretion involved, certain broad principles must be kept in mind. We have been instructed to construe the FTCA liberally in order to implement its broad purpose and to avoid restricting the consent to be sued by expansive construction of exceptions. *See, e. g., Indian Towing Co. v. United States*, 350 U.S. 61, 64–65, 76 S.Ct. 122, 124, 100 L.Ed. 48, 48 (1955); *United States v. Yellow Cab Co.*, 340 U.S. 543, 550, 71 S.Ct. 399, 404, 95 L.Ed. 523, 530 (1951); *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383, 70 S.Ct. 207, 216, 94 L.Ed. 171 (1949). *See also Winston v. United States*, 305 F.2d 253, 270 (2d Cir. 1962) (en banc). We have also been admonished that the newness of the area should not operate as an obstacle to the imposition of liability for "the very purpose of the Tort Claims Act was to waive the government's traditional all–encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." *Rayonier, Inc. v. United States*, 352 U.S. 315, 319, 77 S.Ct. 374, 377, 1 L.Ed.2d 354, 358 (1957). With these instructions in mind we turn to an overview of the particulars of the parole process.

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[7] *Indian Towing* involved an action for negligence against the Coast Guard for the negligent operation and maintenance of a lighthouse. The government conceded, and the court concurred, that the activity was "operational." The court held that once the Coast Guard had exercised its discretion to operate a lighthouse at a certain place it was obligated to use due care to keep it in working order and to discover, repair or warn of malfunctions. 350 U.S. at 69, 76 S.Ct. at 126. It is significant that the dissent in *Dalehite* became the majority in *Indian Towing*.

[8] The *Cohen* and *Fleishour* courts allowed the initiation of a suit by prisoners against prison officials for negligence in protecting plaintiffs from assault and injury by others prisoners. *Fair* involved an action to recover for the death of three persons shot by a homicidal, apparently mentally disturbed, Air Force officer after being negligently released from an Air Force Hospital.

III.

Under the statutes in effect in 1973, the Board of Parole was an organ of the Department of Justice consisting of eight members appointed by the President with the advice and consent of the Senate.[9] 18 U.S.C. § 4201 (1970). Certain basic statutory terms and conditions were placed on the Board's decisionmaking and on a prisoner's eligibility for parole. Specifically, 18 U.S.C. § 4202 (1970) provided that:

> A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or a sentence of over forty-five years.

Further, 18 U.S.C. § 4203(a) (1970) provided that:

> If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.
>
> Such parolee shall be allowed in the discretion of the Board, to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports from such paroled person, as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced....

In essence, parole decisionmaking under these statutes was bounded by a threshold of eligibility based on time served and a duty to protect the welfare of society, in the process of determining the moment when a prisoner had become rehabilitated and thus, likely to live at liberty without violating the laws.

The Board, prior to 1973, exercised its powers in a largely unstructured manner. All release decisions were made by members of the Board after hearings with the inmate and the institutional case worker. Project, *Parole Release Decisionmaking And The Sentencing Process*, 84 Yale L.J. 810, 820 (1975). The hearing stage had been traditionally used by decisionmakers to observe the inmate in order to detect signs of rehabilitation. Parole decisions were made without reference to formal criteria and policies but purely upon the judgment of the Board member making psychological diagnosis and prognosis. *Id.* As a result, the Courts were loathe to review such decisions, especially on constitutional grounds,[10] in the event of parole denial. *See, e. g., Scarpa v. U.S. Board of Parole*, 477 F.2d 278, 280–82 (5th Cir.) *vacated for consideration of mootness*, 414 U.S. 809, 94 S.Ct. 79, 38 L.Ed.2d 44, *dismissed as moot*, 501 F.2d 992 (5th Cir. 1973); *Tarlton v. Clark*, 441 F.2d 384, 385–86 (5th Cir. 1971). However, judicial and scholastic criticism of this system grew due mainly to the large volume of release hearings and the lack of due process, or even explanation, accorded the inmate by the system.[11]

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[9] In 1976 the Board became an independent agency with nine members designated the United States Parole Commission. Parole Commission and Reorganization Act, Pub.L. No. 94-233, § 2, 90 Stat. 219 (1976) *codified at* 18 U.S.C. § 4202 (1976).

In order to rectify this situation, the Board of Parole, in 1973, established specific "guidelines for decision-making" consisting of two basic indices on which inmates are scored in all parole determinations.[12] These indices, the "offense severity" rating and "salient factor score", form the axis of a matrix. At the intersection of each factor/severity category on the matrix is listed a range of months representing the amount of time an inmate having these characteristics and offense rating could expect to be incarcerated prior to parole.[13] The offense severity scale was derived by averaging, on a one to six scale, evaluations by Board members and examiners of the seriousness of typical offenses commonly seen by the Board. As such the scale constitutes the Board's own subjective evaluation of the criminal behavior independent of the legal definition or sentence length.[14] The salient factor score is an actuarial device used to predict the risk of repeat behavior based upon nine statistically determined personal characteristics relevant to such predictions.[15]

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[10] The context of a constitutional or section 1983 challenge to the Board's decisions even under the present system, is completely different from that presented under the FTCA. *See Shahid v. Crawford*, 599 F.2d 666, 668–70 (5th Cir. 1979); *Brown v. Lundgren*, 528 F.2d 1050, 1055 (5th Cir.), *cert. denied*, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 283 (1976); *Pate v. Ala. Bd. of Pardons and Paroles*, 409 F.Supp. 478 (M.D. Ala.) *aff'd* 548 F.2d 354 (5th Cir. 1976).

[11] *See, e. g.*, Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 *Yale L.J.* 810, 821, n.48 (1975); Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria In Law and Practice*, 1966 *Wash.U.L.Q.* 243, 244.

[12] *See* 28 C.F.R. § 2.20 (1979).

[13] The format was adopted nationwide after a pilot project. *See* 38 Fed.Reg. 26652–57 (Sept. 24, 1973), 38 Fed.Reg. 31942–45 (Nov. 19, 1973). They are currently found, with only minor revision, at 28 C.F.R. §§ 2.1–2.59 (1979).

[14] Alschuler, *Sentencing Reform and Parole Release Guidelines*, 51 *U.Colo.L.Rev.* 237, 237–38, 241 (1980); Project, *supra*, note 11, at 823–24.

The following examples are listed in 28 C.F.R. § 2.20:

Low

Alcohol or cigarette law violations, including tax evasion (amount of tax evaded less than $2,000)].

Gambling law violations (no managerial or proprietary interest) ....

Illicit drugs, simple possession ....

Marihuana/hashish, possession with intent to distribute/sale [very small scale (e. g., less than 10 lbs. of marihuana/less than 1 lb. of hashish/less than .01 liter of hash oil)].

Property offenses (theft, income tax evasion, or simple possession of stolen property) less than $2,000.

Low Moderate

Counterfeit currency or other medium of exchange [(passing/possession) less than $2,000].

Drugs (other than specifically categorized), possession with intent to distribute/sale [very small scale (e. g., less than 200 doses)].

Marihuana/hashish, possession with intent to distribute/sale [small scale (e. g., 10–49 lbs. of marihuana/1–4.9 lbs. hashish/.01–.04 liters of hash oil)].

Cocaine, possession with intent to distribute/sale [very small scale (e. g., less than 1 gram of 100% purity, or equivalent amount)].

Note 14—Continued

Gambling law violations—managerial or proprietary interest in small scale operation [e. g., Sports books (estimated daily gross less than $5,000); Horse books (estimated daily gross less than $1,500); Numbers bankers (estimated daily gross less than $750)].

Immigration law violations ....

Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than $2,000.

Moderate

Automobile theft (3 cars or less involved and total value does not exceed $19,999)[3].

Counterfeit currency or other medium of exchange [(passing/possession) $2,000-$19,999].

Drugs (other than specifically categorized), possession with intent to distribute/sale [small scale (e. g., 200-999 doses)].

Marihuana/hashish, possession with intent to distribute/sale [medium scale (e. g., 50-199 lbs. of marihuana/5-19.9 lbs. of hashish/.05-.19 liters of hash oil)].

Cocaine, possession with intent to distribute/sale [small scale (e. g., 1.0-4.9 grams of 100% purity, or equivalent amount)].

Opiates, possession with intent to distribute/sale [evidence of opiate addiction and very small scale (e. g., less than 1.0 grams of 100% pure heroin, or equivalent amount)].

Firearms Act, possession/purchase/sale (single weapon, not sawed-off shotgun or machine gun).

Gambling law violations—managerial or proprietary interest in medium scale operation [e. g., Sports books (estimated daily gross $5,000-$15,000); Horse books (estimated daily gross $1,500-$4,000); Numbers bankers (estimated daily gross $750-$2,000)].

Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/receiving stolen property) $2,000-$19,999.

Smuggling/transporting of alien(s) ....

High

Carnal knowledge[3] ....

Counterfeit currency or other medium of exchange [(passing/possession) $20,000-$100,000].

Counterfeiting [manufacturing (amount of counterfeit currency or other medium of exchange involved not exceeding $100,000)].

Drugs (other than specifically listed), possession with intent to distribute/sale [medium scale (e. g., 1,000-19,999 doses)].

Marihuana/hashish, possession with intent to distribute/sale [large scale (e. g., 200-1,999 lbs. of marihuana/20-199 lbs. of hashish/.20-1.99 liters of hash oil)].

Cocaine, possession with intent to distribute/sale [medium scale (e. g., 5-99 grams of 100% purity, or equivalent amount)].

Opiates, possession with intent to distribute/sale [small scale (e. g., less than 5 grams of 100% pure heroin, or equivalent amount) except as described in moderate].

Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons).

Gambling law violations—managerial or proprietary interest in large scale operation [e. g., Sports books (estimated daily gross more than $15,000); Horse books (estimated daily gross more than $4,000); Numbers bankers (estimated daily gross more than $2,000)].

Involuntary manslaughter (e. g., negligent homicide) ....

Mann Act (no force—commercial purposes) ......

Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/receiving stolen property) $20,000-$100,000.

Threatening communications (e. g., mail/phone)—not for purposes of extortion and no other overt act.

Very High

Robbery—(1 or 2 instances) ....

Breaking and entering—armory with intent to steal weapons ....

Breaking and entering/burglary—residence; or breaking and entering of other premises with hostile confrontation with victim.

Counterfeit currency or other medium of exchange [(passing/possession)—more than $100,000 but not exceeding $500,000].

Drugs (other than specifically listed), possession with intent to distribute/sale [large scale (e. g., 20,000 or more doses) except as described in Greatest I].

Marihuana/hashish, possession with intent to distribute/sale [very large scale (e. g., 2,000 lbs. or more of marihuana/200 lbs. or more of hashish/2 liters or more of hash oil)].

Cocaine, possession with intent to distribute/sale [large scale (e. g., 100 grams or more of 100%

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[15] See note 15 on slip op. page 3362.

Note 14—Continued

purity, or equivalent amount) except as described in Greatest I].

Opiates, possession with intent to distribute/sale [medium scale or more (e. g., 5 grams or more of 100% pure heroin, or equivalent amount) except as described in Greatest I].

Extortion [threat of physical harm (to person or property)] ....

Explosives, possession/transportation ....

Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/income tax evasion/receiving stolen property) more than $100,000 but not exceeding $500,000.

Greatest I

Aggravated felony (e. g., robbery: weapon fired or injury of a type normally requiring medical attention).

Arson or explosive detonation [involving potential risk of physical injury to person(s) (e. g., premises occupied or likely to be occupied)—no serious injury occurred].

Drugs (other then specifically listed), possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e. g., offense involving more than 200,000 doses)].

Cocaine, possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e. g., offense involving more than 1 kilogram of 100% purity, or equivalent amount)].

Opiates, possession with intent to distribute/sale [managerial or proprietary interest and very large scale (e. g., offense involving more than 50 grams of 100% pure heroin, or equivalent amount)].

Kidnaping [other than listed in Greatest II; limited duration; and no harm to victim (e. g., kidnaping the driver of a truck during a hijacking, driving him to a secluded location, and releasing victim unharmed)].

Robbery (3 or 4 instances) ....

Sex act—force [e. g., forcible rape or Mann Act (force)] ....

Voluntary manslaughter (unlawful killing of a human being without malice; sudden quarrel or heat of passion).

Greatest II

Murder ....

Aggravated felony—serious injury (e. g., robbery: injury involving substantial risk of death, or protracted disability, or disfigurement) or extreme cruelty/brutality toward victim.

Aircraft hijacking ....

Espionage ....

Kidnaping (for ransom or terrorism; as hostage; or harm to victim) ....

Treason ....

15. Hoffman & Adelberg, *The Salient Factor Score: A Nontechnical Overview*, 44 Fed.Prob., 44, 44 (Mar. 1980); Project, *supra*, note 11, at 824-25. The items considered in computing the score, a group characterization, are also contained in 28 C.F.R. § 2.20:

SALIENT FACTOR SCORE

Register Number ....

Name ....

Item A .... ☐

No prior convictions (adult or juvenile) = 3
One prior conviction = 2
Two or three prior convictions = 1
Four or more prior convictions = 0

Item B .... ☐

No prior commitments (adult or juvenile) = 2
One or two prior commitments = 1
Three or more prior commitments = 0

Item C .... ☐

Age at behavior leading to first commitment (adult or juvenile):
26 or older = 2
18-25 = 1
17 or younger = 0

Item D .... ☐

Commitment offense did not involve auto theft or check(s) (forgery/larceny) = 1
Commitment offense involved auto theft [X], or check(s) [Y], or both [Z] = 0

Item E .... ☐

Never had parole revoked or been committed for a new offense while on parole, and not a probation violator this time = 1
Has had parole revoked or been committed for a new offense while on parole [X], or is a probation violator this time [Y], or both [Z] = 0

Item F .... ☐

No history of heroin or opiate dependence = 1
Otherwise = 0

Item G .... ☐

Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

Total Score .... ☐

NOTE: For purposes of the Salient Factor Score, an instance of criminal behavior resulting in a judicial determination of guilt or an admission of guilt before a judicial body shall be treated as if a conviction, even if a conviction is not formally entered.

The salient factor scale is based on criteria, in main, available at the time of sentencing and remains generally constant during the entire period of confinement. Neither index measures the inmate's rehabilitation, progress or adjustment in order to determine the time for his release.[16] Further, the time ranges utilized in the matrix represent a historic average of time actually served before parole by inmates with these factor/severity characteristics which were adopted by the Board as the basis for future parole determination.[17]

This new procedure represents an abandonment of the original concept of parole release justified upon its rehabilitative effect and based upon expert evaluation determining the proper moment of release under the statutory mandates.[18] The only element of the original concept retained in the regulations is found in the provisions of Section 2.20(c) for decisions outside the guidelines in certain instances.[19] However these deviations must be supported in writing and appear to be very much the exception.[20] The information considered by the hearing examiners in making their determinations includes reports from institutional staffs, prior criminal and parole record, presentencing investigations, sentencing recommendations and reports of physical, mental or psychiatric examinations. 28 C.F.R. § 2.19 (1973). From these records the salient factor score and offense severity rating are determined as well as any justification for a recommendation outside the guidelines. Hearing interviews appear to operate to confirm the records, to amplify ambiguities and to communicate the examiners' decisions.[21]

The present system has been said to "structure discretion" and to reflect a change in the system's goals away from individualization toward equality of treatment under generalized rules.[22] This appears to be a valid characterization. As a result of this standardization the process certainly takes on a fixed and

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Note 15—Continued
A score of 11-9 is "very good", 8 6 is "good", 5 4 is "fair" and 3-0 is "poor". The four categories for which time range guidelines are provided *Id.*

[16] Alschuler, *supra* note 14, at 238–39; Project, *supra* note 11, at 825.

[17] Project, *supra* note 11, at 825. The ranges were developed originally by researchers based on a median derived from a sample group released between August 1970 and June 1972. Adjustments have been made by Board members based on statistical feedback or their own judgments. *Id.* at n.74. The guideline table was developed through research by the National Council on Crime and Delinquency. *Id.* at n.60.

[18] Alschuler, *supra* note 14, at 238. The author questions whether the guidelines remove the reason for the Parole Board's existence. Indeed, members of the Board have stated that determining the appropriate moment of release is beyond them. *Id.* *See* Project, *supra* note 11, at 826, n.81 & 82, 828.

[19] 28 C.F.R. § 2.20(c) (1979) suggests that violations of assaultive behavior or acts of repeated parole failures may warrant a decision outside the guidelines. Other examples appear to have been suggested but are no longer included in the regulations. *See* Project, *supra* note 11, at 825 and n.78, 826 and n.79.

[20] Between October 1973 and March 1974, the period during which Whisenhant was released, 91.4% of initial parole hearing decisions were within the guidelines. 4.5% were above, 3.8% were below. Project, *supra* note 11, at n.75. *See also Brown v. Lundgren*, 528 F.2d 1050, 1055 (5th Cir.), *cert. denied*, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 283 (1976).

[21] *See* Project, *supra* note 11, at 829–30, 831-833, n.103 & 104, 833 34, n.107 & 109.

[22] Hoffman & Degostin, *Parole Decisionmaking: Structuring Discretion*, 38 *Fed Prob.* 7 (Dec. 1974); Hoffman & Adelberg, *supra* note 15, at 44.

mechanical flavor, with the rendering of determinations made in a somewhat ministerial manner and at a lower administrative level than previously.[23] Yet this characterization is merely the starting point for our analysis, not the denouement.[24]

IV.

The crux of the concept embodied in the discretionary function exemption is that of the separation of powers.[25] Satellite principles, which are perhaps only manifestations of the concept in practical terms, are the ability of the judiciary to adjudicate the claims made[26] and the ability of the administrators to govern by aggressive and effective decisionmaking.[27] Balancing these concerns is clearly the thrust of previous efforts to formulate a standard by reference to "planning–operational" or "discretionary–ministerial" distinctions.[28]

As ably put by Judge McGowan, such tests are

> more concerned with trying to distinguish between the functions performed within an area of readily recognizable governmental responsibility, than with undertaking to define precisely where the boundaries of that area lie. And, with such functions so identified and differentiated, it next inquires whether an injury inflicted as a consequence of one of such functions can be subjected to judicial redress without thereby jeopardizing the quality and efficiency of government itself. "Ministerial" connotes the execution of policy as distinct from its formulation. This in turn suggests differences in the degree of discretion and judgment involved in the particular governmental act. Where those elements are important, it is desirable that they operate freely and without the inhibiting influence of potential legal liability asserted with the advantage of hindsight.

Elgin v. District of Columbia, 337 F.2d 152, 154–55 (D.C. Cir. 1964).

It would certainly be valuable to articulate relevant criteria to be weighed by the trial courts in the context of the circumstances of each case which would account for and protect each policy consideration raised by the existence of this exemption in a statute designed to ease the burden of governmental injury on citizens. *See White v. United States*, 317 F.2d 13, 16 (4th Cir. 1963). *See also Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 255, 407 P.2d 440, 445 (1965); *Bellavance v. State*, 390 So.2d 422 (Fla. 1st D.C.A.1980). Therefore, we will attempt to delineate some of the factors relevant to our inquiry without proposing a precise litmus paper test. *See Hendry v. United States*, 418 F.2d 774, 782 (2d Cir. 1969). The approach we take is based upon a pragmatic interest analysis which seeks a delicate balance between activism[29] and restraint, without the conclusory application of labels.[30] The most apt analogy is found, at least in regard to weighing institutional factors, in the Supreme Court's approach to the issue of political questions as set out in *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).[31] To this analysis must be added the consideration of the interests of the injured party since the spread of monetary losses among the taxpayers is the principle concern of the FTCA. *See Indian Towing Co. v. United States*, 350 U.S. 61, 64–65, 76 S.Ct. 122, 124, 100 L.Ed. 48 (1955); *Downs v. United States*, 522 F.2d 990, 998 (6th Cir. 1975); *Smith v. United States*, 375 F.2d 243, 248 (5th Cir. 1967).[32]

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[23] Commentators have indicated that two types of decisions are made in the parole process: parole policy decisions set by the Board members and individual case decisions delegated to hearing examiners. This division of labor leaves the Board members free to focus on policy making adjustments, monitoring and appeals. Hoffman & Degostin, *supra* note 22, at 7–11.

[24] *Cf. White v. United States*, 317 F.2d 13, 16 (4th Cir. 1963). (each case must be measured against the broad spectrum of government activity).

[25] *See* James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U.Fla.L.Rev. 184, 184 (1957); Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 Iowa L.Rev. 930, 946 (1971).

There is evidence in the legislative history to support this. When the present language was substituted for an earlier laundry list provision exempting specified activities from the FTCA, an Assistant Attorney General explained the change by observing that:

> the cases embraced within [the new] subsection would have been exempted from [the prior] bill by judicial construction. It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but H.R. 6463 makes this specific.

Hearings on H.R. 5373 and 6463 before the House Committee on the Judiciary, 77th Cong. 2d Sess. 29 (1942) (statement of Francis M. Shea). *See Blessing v. United States*, 447 F.Supp. 1160, 1171 (E.D. Pa. 1978).

[26] *See* James, *supra* note 25 at 184. The basic problem is that obviously tort law "furnishes an inadequate crucible for testing the merits of social, political, or economic decisions." 447 F.Supp. at 1170.

[27] *See United States v. Muniz*, 374 U.S. 150, 163, 83 S.Ct. 1850, 1858, 10 L.Ed.2d 805, 815 (1963). Note, *supra* note 25, at 942–43, 950–51.

[28] *See Dalehite v. United States*, 346 U.S. 15, 35–36, 42, 73 S.Ct. 956, 967–968, 971, 97 L.Ed. 1427 (1953); Note, *supra* note 25, at 950, n.105.

[3] Considering initially the injured party, the court should review the nature of the loss imposed by the governmental injury. The more serious, in terms of physical or mental impairment, and isolated the loss the closer the question becomes as to whether the individual can be expected to absorb the loss as incident to an acceptable social or political risk of governmental activities.[33] Other factors to be weighed are the expectation of the public or the injured party and the nature of the reliance, whether based upon a consistent level of governmental activity or upon the party's lack of foresight. However, deep analysis of these considerations would be more significant in the negligence phase of the court's determinations. A further point of consideration might be the existence of alternative remedies or compensations for the injured party,[34] since the dearth of such alternatives was a primary reason for the enactment of the FTCA.[35]

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[29] *See generally*, Johnson, *In Defense of Judicial Activism*, 28 *Emory L.J.* 901 (1979).

[30] *W. Prosser, Handbook On The Law Of Torts*, § 132, at 988-91 (4th Ed. 1971); Note, *supra* note 25, at 952, n.105; 447 F.Supp. at 1168.

[31] The Court cited certain prominent formulations, the inextricable existence of such would result in dismissal. They are:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217, 82 S.Ct. at 710.

[32] *See* Note, *supra* note 25 at 976-78.

[33] *Id.* at 977. *See Downs v. United States*, 522 F.2d 990, 998, 1003 (6th Cir. 1975) (need to compensate for injuries balanced against effect on law enforcement activities and reasonableness of FBI's attack on hijacked plane).

[34] *See Bellavance v. State*, 390 So.2d at 423-24.

[35] *See* H.R.Rep.No.2800, 71st Cong., 3d Sess., p. 2-3; H.R.Rep.No.2428, 76th Cong., 3d Sess.,

Looking to the government's interest, the trial court would need to assess the nature and quality of the governmental activity causing the injury. *Smith v. United States*, 375 F.2d 243, 246 (5th Cir. 1967). This could be done by examining the agency's guidelines, or procedures in the area, *see, e. g., Griffin v. United States*, 500 F.2d 1059, 1064–68 (3d Cir. 1974), and determining the administrative level at which the injurious activity took place. *See, e. g., Hendry v. United States*, 418 F.2d 774, 783 (2d Cir. 1969). Along these lines, the Court must determine if the allegations attack the rules formulated by the agency or merely their application. *Dalehite v. United States*, 346 U.S. at 27, 35, 73 S.Ct. at 967, 968, 97 L.Ed. at 1436, 1440; *Hendry v. United States*, 418 F.2d at 782. Certain of the *Baker* considerations become relevant at this juncture: whether this activity is one traditionally or constitutionally exercised by a coordinate branch of government or one fraught with political or policy overtones such as the feasibility or practicality of a program, *Dalehite v. United States*, 346 U.S. at 34, 73 S.Ct. at 967, or prosecutorial discretion, *Smith v. United States*, 375 F.2d at 248, and whether this injurious activity is in an area of potential governmental embarrassment such as foreign affairs.[36] *Id.* Further, a careful assessment of the actual burden, in both the long and short run, on governmental activities and the alternatives available ought to be made.[37]

The third interest to evaluate, consistent with the approach in *Baker*, should be the court's capacity for deciding the case. The Court should consider, whether the vehicle of a tort suit provides the relevant standard of care, be it professional or reasonableness, for the evaluation of the governmental decision. *Hendry v. United States*, 418 F.2d at 783. Similarly, the court should determine whether the factors for decision are primarily of such political, social or economic nature as to be beyond the court's experience

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p. 2; H.R.Rep.No.2245, 77th Cong., 2d Sess., p. 5 7; H.R.Rep.No.1287, 79th Cong., 1st Sess., p. 1 2; S.Rep.No.1400, 79th Cong., 2d Sess., p. 29 31.

[36] A similar approach has been adopted by several states. For example, a four-pronged preliminary test to identify discretionary functions was announced by the Washington Supreme Court in 1965 and adopted by the Florida Supreme Court in 1979. *See Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 407 P.2d 440, 445 (1965); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1019 (Fla.1979); *Bellavance v. State*, 390 So.2d 422, 423-424 (Fla. 1 D.C.A. Nov. 13, 1980). The test is:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

407 P.2d at 445.

[37] *See* Note, *supra* note 25 at 980. *See also Bellavance v. State*, 390 So.2d at 423-24.

gained even in civil rights and antitrust litigation. *See, e. g., Blessing v. United States*, 447 F.Supp. at 1183–85. On this point, complexity alone is not dispositive, but rather the Court should assess the nature of the complications and their amenability to the judicial process of evidential offering, evaluation and determination. *See Griffin v. United States*, 500 F.2d at 1064.

V.

Having investigated the mechanical details of the Parole Board's decisionmaking process, and formed an analytical framework for section 2680(a) determinations, we are brought to the application of the alleged facts to this framework and the policy considerations raised. The appellants' losses sustained by the brutal rape, murder and mutilation of their wife/mother can only be described as severe and isolated. Such loss is difficult to justify as the risk of almost any governmental activity.[38] Further, they, as members of the public, have the right to expect vigorous governmental efforts to protect against such occurrences. Indeed, the expectation that the Board will act consistently with the protection of society and its welfare is expressed in the parole statute itself. *See* 18 U.S.C. § 4203(a) (1970). Alternative remedies such as life insurance would appear to constitute inadequate compensation in light of the brutal nature of appellants' decedent's death. Nor does a federal victim of crimes compensation program exist. Therefore, the seriousness of appellants' loss give rise to the need for a close and careful examination of the competing governmental interests.[39]

The present administration of the parole system, as noted above, is carried on in a somewhat ministerial fashion at a low level within the agency. The process requires the hearing examiner to review the records, add up pre-identified salient characteristics of the offender and to compare this to a largely predetermined offense severity rating in order to find the appropriate time frame for release. If not a totally fixed and mechanical process, this certainly comes very close to being decisionmaking between "the limits of positive rules . . . subject to . . . review". *Dalchite v. United States*, 346 U.S. at 34, 73 S.Ct. at 967. In this regard, appellant alleges the Parole Board's failure to obtain and read all records required by the regulations to be considered, i. e. Whisenhant's psychiatric evaluations. This is a mandatory requirement placed on hearing examiners by the Board and not a policy-making function. *See* 28 C.F.R. § 2.19; *Jones v. Johnson*, 402 F.Supp. 992, 998–99 (E.D. Pa.1975). Therefore, without further analysis, seeking relief for the failure to proceed in accordance with the agency's own regulations does not appear to raise significant separation of powers problems so as to preclude the action under the discretionary function exemption. *See United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 394 (6th Cir. 1974).

Appellant also alleges, in the alternative, that the Board simply disregarded the psychiatric evaluations of Whisenhant as a homicidal psychotic likely to repeat his brutal behavior. This allegation implicates the decisionmaking process most directly and therefore raises separation of powers issues. The government has taken the position that even if the Board knew Wisenhant would go on such a hideous rampage as occurred it still had the discretion to release him and remain protected from liability under section 2680(a). This cannot be true!

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[38] We do not implicate the decisions made under 28 U.S.C. § 2674 which bar liability for injuries to servicemen arising out of or in the course of activity incident to military service. *See Stencel Aero Engineering. Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977). *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950); *Johnson v. United States*, 631 F.2d 34, 35 (5 Cir. 1980). Much of the cost for such losses are handled through direct government intervention.

[39] *See Bellavance v. State*, 90 So.2d at 324 25. Actions for speculative or intangible losses might well constitute mere harassment of governmental policies and programs.

[4, 5] The Board's discretion to release is limited both by the threshold time-served eligibility criteria of 18 U.S.C. § 4202 (1970) and the duty to establish "a reasonable probability that such prisoner will live and remain at liberty without violating the laws" and to form an opinion that "such release is not incompatible with the welfare of society." 18 U.S.C. § 4203(a) (1970). *See deVyver v. Warden, U. S. Penitentiary*, 388 F.Supp. 1213, 1218–20 (M.D.Pa.1974). *See also Merchants Nat. Bank & Trust Co. of Fargo v. United States*, 272 F.Supp. 409, 415–19 (D.N.D.1967). Congress was concerned and under the statute, there is a duty to act in good faith to society.[40] Certainly a release in total disregard of known propensities for repetitive brutal behavior is not an abuse of discretion but rather an act completely outside of clear statutory limitations.

The Supreme Court reached a similar conclusion in *Hatahley v. United States*, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956). In this action, Navajo Indians sued under the FTCA to recover for confiscation and destruction by federal agents of their horses grazing on federal lands. The agents claimed the protection of section 2680(a) while acting pursuant to the Utah abandoned horse statute, knowing that the horses were not abandoned and to whom the horses belonged. *Id.* at 179–81, 76 S.Ct. at 750–51. The court held that these wrongful trespasses did not involve discretion or even abuse thereof and that the claim was compensable under the FTCA. *Id.* at 181, 76 S.Ct. at 751. Therefore, the government's position in this action cannot be maintained.

[6] The question then becomes, where does the discretion of the Parole Board lie? It is important to note at this point that the allegations attack only the application of the Parole Board's guidelines to Whisenhant and not the guidelines themselves. The exercise of policy-making discretion by the Board occurred in formulating and implementing the guideline criteria and matrix. *See Hendry v. United States*, 418 F.2d at 782; *Downs v. United States*, 522 F.2d at 997. *See also Johnson v. State*, 69 Cal.2d 782, 73 Cal. Rptr. 240, 250, 447 P.2d 352, 362 (1968). The decision to reject the rehabilitative approach of previous parole evaluations and to adopt the present system was one fraught with social, political and limited resource allocation policy considerations. Such "policy" decisions, whether good or bad, are probably exempt under *Dalehite*. But surely the application of these guidelines to Whisenhant is not. Such an act has none of the political policy overtones that exist in certain law enforcement situations, such as enforcing integration.[41]

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[40] *See Grimm v. Arizona Board of Pardons & Paroles*, 115 Ariz. 260, 267, 564 P.2d 1227, 1234 (1977) (Board members have duty to public to avoid grossly negligent release of highly dangerous prisoners); *Restatement (Second) of Torts*, § 319 (1965). *Cf. Gullatte v. Potts*, 630 F.2d 322, 322–23 (5th Cir. 1980) (placing of "snitch" in general prison population was action so likely to produce injury as to be substantially certain and to raise an ordinary tort to level of constitutional violation).

[41] To state the obvious, criminal incarceration is not a question solely in the providence of a single branch of government. Congress decides the broad or narrow limits for sentences and whether parole shall exist. The judiciary is required to sentence and has some role in certain releases. The executive administers the

Compare United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971, 85 S.Ct. 1327, 14 L.Ed.2d 268 (1965) *and DePass v. United States*, 479 F.Supp. 373, 376–77 (D.M.D.1979), *with Downs v. United States*, 522 F.2d 920 (6th Cir. 1975). The choices involved in applying the guidelines and releasing a particular person are of another sort. Whether characterized as "operational", "day-to-day" or by some other label, they do not achieve the status of a basic policy evaluation and decision.[42] Such decisions, if negligent, are not protected by section 2680(a).

Appellants' allegations as to improper parole supervision or failure to formulate adequate conditions of parole as nondiscretionary actions are not without precedent. In *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966) this Court determined that the negligent discharge without restrictions, of a mental patient made without adequate consideration of the patient's history by the releasing psychiatrists, was actionable and not protected by section 2680(a). *Id.* at 98. *See Merchant's Nat. Bank & Trust Co. of Fargo v. United States*, 272 F.Supp. 409, 411–14 (D.N.D.1967). The alleged actions of the Parole Board in this case are not meaningfully distinguishable.

[7] There exists a growing body of authority which has recognized both the duty to properly supervise patients/parolees who are dangerous to themselves or others,[43] *see Rieser v. District of Columbia*, 563 F.2d 462, 475 (D.C.Cir.1977) (en banc); *White v. United States*, 317 F.2d 13, 16–18 (4th Cir. 1963) and to advise the appropriate officials of their release, *Semler v. Psychiatric Institute of Washington, D. C.*, 538 F.2d 121, 127 (4th Cir. 1976), or to warn potential victims *see Fair v. United States*, 234 F.2d 288, 291–94 (5th Cir. 1956); *Merchants Nat. Bank & Trust Co. of Fargo v. United States*, 272 F.Supp. 409, 418 (D.N.D.1967); *Tarasoff v. Regents of University of California*, 45 L.W. 2046, 2046 (Cal. July 1, 1976); *Johnson v. State*, 447 F.2d 352, 355, 360 (Cal.1968) (*en banc*); *Goergen v. State*, 196 N.Y.S.2d 455, 457–62, 18 Misc.2d 1085 (Ct.Cl.N.Y.1959). These decisions are consistent with a recognized public duty, or individualized special duty based on the circumstances of the case, to protect society from harm in the execution of policy once it has been formulated.[44] While perhaps a high level allocation of manpower and financial resources or some other clear policy oriented decision may exempt the government from liability in particular cases, the facts of this case as alleged provide an insufficient basis for dismissal due to social, political or economic policy implications.

The burden upon governmental activity in this area due to judicial scrutiny

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prison and parole system within its discretion. The roles played are not insular or discreet and other processes for reaching the same ends involving a different allocation of duties exist. *See, e. g.*, Arthur & Karsh, *Release Hearings: To Protect The Public!* 40 Fed.Prob. 55 (Sept. 1976).

[42] *See, e. g., Johnson v. United States*, 516 F.2d 606, 609 (5th Cir. 1978); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956); *Merchants Nat. Bank & Trust Co. of Fargo v. United States*, 272 F.Supp. at 418; *Bellavance v. State*, 90 So.2d at 323-24.

[43] There is also a duty to protect the person in custody on a probationary status from injury by others, *see, e. g., Rogers v. United States*, 397 F.2d 12, 14-15 (4th Cir. 1968), or infants from the environment. *See Bryant v. United States*, 565 F.2d 650, 653 (10th Cir. 1977).

[44] *See* Kutcher, *The Legal Responsibility of Probation Officers in Supervision*, 41 Fed.Prob. 35, 35-38 (March 1977); Note, *Parole Board Members Have Only Qualified Immunity For Decision to Release Prisoner*, 46 Fordham L.Rev. 1301, 1304-06 (1978); Note, *Parole Board Liability For The Criminal Acts of Parolees*, 8 Capital U.L.Rev. 149 (1978).

and the possibility of tort liability warrants some discussion. It is significant that an FTCA action only involves governmental liability and not personal liability for negligent activities. Therefore, we doubt that the government's potential liability will be a significant inhibitor to the exercise of governmental decision-making.[45] Any financial uncertainty at the planning level can be budgeted for or covered by liability insurance. A variety of alternatives appears available.[46]

There are, of course, positive aspects to the imposition of liability. Accountability acts as an incentive for professional and efficient administration. Government employees should as a result, and consistent with the statutory duty imposed upon them, tend to articulate a basis for their decisions which serves the needs of society as well as those of the individual person and not act in an unbridled fashion. As government grows and the potential for harm by its negligence increases, the need to compensate individuals bearing the full burden of that negligence also increases. Suits under the FTCA provide a fair and efficient means to distribute the losses as well as the benefits of a parole system.

The final aspect to be assessed, judicial review, in and of itself poses no threat to governmental processes. There is little risk of embarrassment from a condemnation of policies. Such are exempt. The potential for public embarrassment, in light of the grievous losses sustained by appellants, appears far greater from the exemption of liability in instances of wanton or negligent errors than from imposition of liability. Further, the only issue before the court in trying such actions would be the reasonableness of the injurious activity, not whether the best alternative was chosen. There is ample room for vigorous governmental implementation of policies when the only limit placed upon such activities is that officials do not act in a manner so unreasonable that no sensible well-intentioned person could accept it.[47]

We reach then, the judicial problems inherent in such cases, essentially the capacity of courts to decide and the amenability of the case to judicial processes.[48] While the decisions made by parole hearing examiners are somewhat unique, there is analogy available in the instance of release of dangerous mental patients from hospitals or custody. A tort suit utilizing either the reasonable man standard or a professional standard would appear to be the classic vehicle for analysis. *See Johnson v. State*, 447 P.2d at 363. Nor are the considerations too complex or intangible as to be beyond the court's experience developed in medical malpractice cases, integration and antitrust litigation as well as long experience dealing with criminals and overzealous law enforcement officials. In sum, we conclude that there is no convincing argument, consistent with the mandates of *Indian Towing, Yellow Cab* and *Rayonier*, for the preclusion of subject matter jurisdiction, on the facts alleged, under 28 U.S.C. § 2680(a).

VI.

[8–10] Turning to appellants' other allegations, although not extensively briefed or argued, we recognize that the arguments in regard to the United States Bureau of Prisons raise similar considerations as those made against the Board of Parole. In this vein, it appears that the duty of the Bureau of Prisons to provide adequate and complete records for parole determinations is also ministerial and not policymaking in nature. It is also well settled that once government officials decide to provide psychiatric treatment, the discretionary function exception no longer shields them from liability for the negligent provision of such medical services. *See, e. g., Underwood v. United States,* 356 F.2d 92, 98 (5th Cir. 1966); *White v. United States,* 317 F.2d 13, 17 (4th Cir. 1963); *Fair v. United States,* 234 F.2d 288, 293 (5th Cir. 1956); *United States v. Gray,* 199 F.2d 239, 241 (10th Cir. 1952). *Cf. United States ex rel. Fear v. Rundle,* 506 F.2d 331 (3d Cir. 1974), *cert. denied,* 421 U.S. 1012, 95 S.Ct. 2416, 44 L.Ed.2d 679 (1975). Even the discretion of the Attorney General and prison officials to classify and segregate prisoners is not unbounded. *See, e. g., United States v. Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); *Bowring v. Godwin,* 551 F.2d 44, 47 (4th Cir. 1977); *McCray v. Sullivan,* 509 F.2d 1332, 1334 (5th Cir.), *cert. denied,* 423 U.S. 859, 96 S.Ct. 114, 46 L.Ed.2d 86 (1975); *Carter v. United States,* 283 F.2d 200, 203 (D.C.Cir.1960); *Cohen v. United States,* 252 F.Supp. 679, 687 (N.D.Ga.1966), *rev'd on other grounds,* 389 F.2d 689 (5th Cir. 1967).

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[45] *See Bellavance v. State*, 90 So.2d at 324–25; Kutcher, *supra* note 44, at 36; Note, *supra* note 25, at 971.

[46] *See* Note, *supra* note 25, at 972.

[47] *See* Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 *Crim. & Del.* 1, 3–7 (1968); Breiter, *Controls in Criminal Law Enforcement*, 24 *U.Chi.L.Rev.* 427, 434 (1960). *See also Downs v. United States*, 522 F.2d 990, 998 (6th Cir. 1975).

[48] *See* text Part IV; Slip Op. p. 3364, p. — *supra*.

CONCLUSION

For the reasons stated, we hold the allegations of the appellants' complaint do state a claim for relief. The order of dismissal is reversed and the case remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

PREPARED STATEMENT OF FRANK CARRINGTON

Mr. Chairman: My name is Frank Carrington. I reside at 4530 Oceanfront, Virginia Beach, VA. 23451 (Tel. 804-428-1825). I am employed as Executive Director of the Victims' Assistance Legal Organization, Inc. (VALOR), formerly named the Crime Victims Legal Advocacy Institute, Inc.

VALOR is a national, not-for-profit, public interest legal organization which serves as a clearing-house of research, information and education about the legal rights of the victims of crime. Our area of specialization involves the concept that crime victims have, or should have, the same right of legal redress, in the civil courts, as, say, someone who has been injured through the negligence of another in a traffic accident or through the malfunction of a manufactured product.

This area of our operation, in turn, seeks to foster and enhance the concept that crime victims should have a right of action not only against the actual perpetrators of the crimes involved but in addition against third parties whose negligence caused, facilitated or failed to prevent such crimes. To our knowledge, VALOR is the only national organization engaged in such a program.

By way of personal introduction, Mr. Chairman, I am a graduate of the University of Michigan Law School (1960), and I received a Master of Law degree in criminal law from Northwestern University in 1970. I am a member of the Bars of the Supreme Court of the United States and the states of Virginia, Illinois, Colorado and Ohio.

I was involved in active law enforcement work from 1960 to 1970 as a U.S. Treasury Agent, Criminal Investigator in the U.S. Marine Corps, and Legal Advisor to the Chicago and Denver Police Departments. I served as Executive Director of Americans for Effective Law Enforcement, Inc., from 1970 to 1979.

I have served as Chairman of President-Elect Reagan's Advisory Task Force on Victims, as Assistant Director for Criminal Justice Policy on the Reagan/Bush Transition Team, as Chairman - designate of the Committee on Victims of the American Bar Association, and as a member of the Attorney General of the United States' Task Force on Violent Crime.

Mr. Chairman, I appear here today, on behalf of VALOR, to endorse without reservation S. 2420 - Omnibus Victims Protection Act of 1982 (hereafter referred to as the Heinz/Laxalt Bill). As you know, I had the privilege of working with Senatorial staff members on the formulation of this bill so I am well-acquainted with its provisions. At the outset, I would like to take the liberty of commending you and Senator Heinz and your staff members, in particular Jock Nash, Catherine Milton and Joe Leyden for taking this very significant legislative initiative in the area of victims.

As noted, VALOR enthusiastically endorses all of the provisions of the Heinz/Laxalt Bill. I would like to confine my remarks today to addressing a single provision: TITLE IV - FEDERAL ACCOUNTABILITY FOR ESCAPE OR RELEASE OF A FEDERAL PRISONER. Because VALOR is concerned almost exclusively with victims' legal rights, we consider this provision to be the most important in the Bill.

Mr. Chairman, the amount of victimization in this country has reached shocking proportions. This is bad enough; but there is one level of victimization, or, more properly, re - victimization, which Title IV addresses, that is absolutely intolerable. This re - victimization takes place when some convicted criminal, who has already been adjudged by society to be dangerous, is incarcerated and then there arises an early release, an escape, or a failure to supervise, under conditions of gross negligence on the past of the correctional officials involved, which results in another murder, rape, robbery, assault or other violent crime.

Concededly, the criminal justice system in our society cannot protect all of our citizens from the depredations of the lawless and violent. But there is no excuse whatever when someone who is already confined precisely because he or she is dangerous to be negligently placed in a position to victimize again.

A case currently in the federal court system demonstrates this most graphically - and most tragically.

In this case, Payton v. United States, 636 F. 2d 132 (5th Cir. 1981), a certain Whisenhant, the releasee, was serving a 20 year federal sentence for the ". . . severe and brutal beating . . . " of a female. 636 F.2d at 134. Whisenhant ". . . manifested his continued homicidal tendencies by threatening the life of the only female with whom he came in contact, an employee of the federal penitentiary at which he was incarcerated." 636 F 2d at 134. Whisenhant ". . . was repeatedly diagnosed as psychotic and described as suffering from schizophrenia, paranoid type. His mental condition was noted as agressive and chronic, severe, and manifested by brutality and assaultive behavior." 636 F2d at 134. Significantly, for purposes of our argument herein, a psychiatrist testified, at the trial of Whisenhant for the rape, murder and multilation of appelants' decedent, that ". . . as a homicidal psychotic his release on parole was previous error bordering on gross negligence." 636 F2d at 135. Despite all of the foregoing, Whisenhant was released after serving roughly one-third of his sentence, and he then raped, murdered and mutilated the bodies of three women.

Mr. Payton, the husband of one of these victims, sued the federal parole board for gross negligence in the release of Whisenhant; he lost in the U.S. District Court, but a panel of the U.S. Court of Appeals for the Fifth Circuit reversed and ruled, in effect, that the negligence in the release of Whisenhant was so gross that it was not protected by the doctrine of Sovereign Immunity. The Fifth Circuit granted re-hearing en-banc and still has the case under advisement.

Mr. Chairman, VALOR (sub-nom the Crime Victims Legal Advocacy Institute) et al filed a brief amici curiae in support of Mr. Payton's position. Our brief contains the legal and policy arguments that we believe support the contention that government should be held liable for gross negligence on the part of its correctional officials directly and proximately causes the re-victimization of others.

After consultation with and agreement by your staff, I respectfully request that our brief amici curiae be made a part of this testimony.

The underlying philosophy of our brief and that of Title IV was admirably and succinctly summed up by Senator Heinz when he introduced the Heinz/Laxalt Bill, S. 2420:

> Once a person has been convicted and sentenced to prison, it becomes important to society that the departments charged with that person's custody perform their duty at an acceptable level. One provision of this bill will place liability on the Federal Government in cases where convicts are released or escape through the gross negligence of Federal officials. In my view, public policy would be well served by allowing such suits under the Federal Tort Claims Act. I think this represents good policy for three reasons: First, parole and probation officers would be considerably more cautious in releasing potentially dangerous convicts; second, it would force these officials to be publicly accountable - although not personally liable - for what are often grossly negligent acts. Finally, and most important, victims would be provided a Federal cause of action. Damages would be awarded if gross negligence caused the premature release or the escape of a violent Federal prisoner who went on to prey on society. (S. Cong. Rec., April 22, 1982, p. 3853).

We believe that the Heinz/Laxalt bill is a long-overdue initiative in the field of victims rights and we urge its passage.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOUGLAS GLYNN PAYTON, Administrator of the
Estate of Sheryl Lynn Payton, Deceased, et al.,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

REHEARING EN BANC

No. 79-2052

BRIEF, AMICI CURIAE, IN SUPPORT OF PLAINTIFFS-APPELLANTS, BY THE CRIME VICTIMS LEGAL ADVOCACY INSTITUTE, INC.; THE NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, INC.; AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

STATEMENT OF THE FACTS

We adopt the brief of Plaintiffs-Appellants.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

We adopt the brief of Plaintiffs-Appellants.

ARGUMENT

Amici will not reiterate the legal arguments made by counsel for Plaintiffs-Appellants in this case, although we agree with them and wish to associate ourselves with them. In this brief, *amici curiae* will address important policy considerations.

1. POLICY CONSIDERATIONS DICTATE THAT THE PANEL'S EMPHASIS ON THE RIGHTS OF INDIVIDUALS AGGRIEVED BY THE TORTIOUS CONDUCT OF GOVERNMENT OFFICIALS WAS CORRECT

This is a case of first impression, there being no cases in the Fifth Circuit precisely on point. The question presented is the narrow one of whether the release of a prisoner with psychotic homicidal tendencies, by agents of the United States Parole Board, without adequate review of the prisoner's record, should be considered a "discretionary" act, immune from liability under 28 U.S.C. §2680(a) (Federal Tort Claims Act).[1]

Amici submit that, in such cases of first impression, this Court in arriving at its decision has the prerogative, perhaps even the duty, to take into consideration certain important policy considerations. Indeed, the Suggestions for Rehearing *En Banc* filed by Defendant-Appellee (hereafter, "Government") couches a major portion of its Introduction in pure policy terms:

> Moreover, the specter of liability in damages as a result of decisions to grant or deny parole, whether suit is brought against a parole official individually or against the United States, will have an adverse effect on the federal parole system by deterring parole officials from the independent exercise of the discretion imposed on them by law. (Suggestion for Rehearing *En Banc*, at 2.)

Additionally, the panel opinion of this Court stressed the policy aspects of the case in deciding the primary issue, whether the acts of the Parole officials were "discretionary," as a matter of law:

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[1] *See Fair* v. *United States*, 234 F.2d 288 (5th Cir. 1956) and *Underwood* v. *United States*, 356 F.2d 92 (5th Cir. 1966), both of which support Plaintiffs-Appellants' contention that the actions taken by the governmental officers in the instant case were not "discretionary" under 28 U.S.C. §2680(a), but dealt with negligent release of *mental patients* as opposed to the parole of prisoners. Cases from other federal Circuits and Districts have spoken generally to the issue. *See*: *Folliard* v. *Semler*, 538 F.2d 121 (4th Cir. 1976), *cert. denied*, 429 U.S. 827, 97 S.Ct. 83, 50 L.Ed.2d 90 (1976); *White* v. *United States*, 317 F.2d 13 (4th Cir. 1963); *Rieser* v. *District of Columbia*, 188 U.S. App. D.C. 384, 580 F.2d 647 (1978); *Merchants Nat. Bank & Trust Co. of Fargo* v. *United States*, 272 F. Supp. 409 (D.N.D. 1967). These cases also support Plaintiffs-Appellants position. The Supreme Court of the United States has not ruled specifically on the question presented, its holding in *Martinez* v. *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980) being premised on entirely different grounds. (An analysis of *Martinez* in the context of the instant case is presented *infra* at p. 16.)

> Certain of the Baker [v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)] considerations become relevant at this juncture: whether the activity is traditionally or constitutionally exercised by a coordinate branch of government or one fraught with political or policy overtones such as the feasability or practicability of a program . . . (Emphasis added.) 636 F.2d 132, at 144.

The policy issue in the instant case deals with the loss of human life which has been proximately caused by the gross negligence of government officials who ordered the release on parole of a patently dangerous individual. The loss of life to the victim and the loss of the victim to his or her survivors is surely the most fundamental deprivation of rights that any governmental action could cause.[2/]

When cases of first impression, turning upon unresolved issues of statutory interpretations, are to be decided, Amici submit that in examining the policy issues involved, the greatest weight should be accorded to the protection of the rights of the individual. We further submit that, within the framework of individual rights, the needless taking of human life should be of primary concern.

This is precisely the approach taken by the panel opinion. Within its analytical framework of statutory construction of section 2680(a), the panel held, with regard to the policy issue involved, that the humanistic approach should be taken:

[2/] While the instant case involving the question of governmental liability for the rape, murder and mutilation of the bodies of three innocent victims was being decided, the Supreme Court of the United States was in the process of ruling upon the question of whether other government officials (prison wardens) should be held liable in damages to a prisoner for violating his civil rights because they "negligently" lost a $29.90 model airplane kit which had been sent to him. Parrat v. Taylor, ___ U.S. ___, 101 S.Ct. 1908, ___ L.Ed.2d ___ (1981).

> The appellants' losses sustained by the brutal rape, murder and mutilation of their wife/mother can only be described as severe and isolated. Such loss is difficult to justify as the risk of almost any governmental activity. (Emphasis added.) 636 F.2d at 145.

On the other hand, the Government urges this Court to take a purely mechanistic approach to the issue of statutory interpretation; so mechanistic, in fact, that the loss or potential loss of human life simply is not a factor for consideration. As the panel noted:

> The government has taken the position that even if the Board knew Wisenhant [sic] would go on such a hideous rampage as occurred it still had the discretion to release him and remain protected from liability under section 2680(a). 636 F.2d at 146.

The panel rejected this contention of absolute immunity in the most forceful manner stating: "This cannot be true!" (Exclamation point in the original.) 636 F.2d at 146. We urge this en banc Court to hold in a similar fashion.

To determine whether there is a trend in our jurisprudence away from absolute immunity and towards protection of the rights of the individual, we need look no further than recent decisions of the Supreme Court of the United States. In two civil rights cases dealing with the question of absolute immunity for government entities (municipalities) for civil rights violations under 42 U.S.C. §1983, the Court foreclosed the immunity defense completely. In Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Court overruled Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and held that municipalities were "persons" under the Federal Civil Rights Act and hence not absolutely immune from liability. In Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the Court went even further and held that municipalities (as opposed to public officials personally) were not entitled to assert the defense of good faith as a bar to liability in civil rights cases.

Likewise, the Court has recently held that public officials are not absolutely immune from liability in civil rights cases but, rather, have only a qualified immunity based on good faith. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

While the cases cited above were brought under the Federal Civil Rights Act, 42 U.S.C. §1983, and while the instant case arose out of the Federal Tort Claims Act, we cite the civil rights immunity cases to point out that there is a definite and discernible trend in the Supreme Court which elevates the rights of individuals aggrieved by governmental misconduct over technical concepts of absolute immunity. We urge this principle be given weight by the en banc Court in the instant case.

II. THE PANEL OPINION, IF UPHELD, WILL LEAD NEITHER TO A MULTIPLICITY OF LAWSUITS NOR HAVE A "CHILLING EFFECT" UPON INDEPENDENT PAROLE DECISIONMAKING

The panel in the instant case noted that one of the major factors it considered in reaching its decision was:

> . . . the actual burden, in both the long and short run, on governmental activities . . . 636 F.2d at 145.

The panel resolved the question in favor of the liability concept as opposed to the absolute immunity theory espoused by the government. In pertinent part, the panel stated:

> As government grows and the potential for harm due to its negligence increases, the need to compensate individuals bearing the full burden of the negligence also increases. Suits under the FTCA provide a fair and efficient means to distribute the losses as well as the benefit of a parole system. 636 F.2d at 148.

The Government strongly contests the panel's conclusions on two grounds. First, the Government contends that, if the panel decision is upheld, ". . . the United States will be subjected to novel and unprecedented liabilities . . ." (Suggestion for Rehearing En Banc, at 2); we interpret this to be a contention that the panel holding will lead to a multiplicity of lawsuits.

Second, the Government expresses concern that the panel ruling ". . . will have an adverse impact on the federal parole system by deterring parole officials from the independent exercise of discretion imposed on them by law." (Suggestion for Rehearing, En Banc, at 2.) This is the "chilling effect" argument.

While both concerns seem legitimate, Amici submit that the government overstates the potential adverse impact of the panel ruling and completely ignores its beneficial effects. We will demonstrate in this section of our argument that the past history of third-party victim lawsuits against custodial officials demonstrates that neither of the Government's policy-issue contentions is well founded.

The rationale of our argument can be summed up concisely: almost every case, successful or unsuccessful, which has been brought by victims or their survivors against custodial officials for release of dangerous prisoners had, as its basic premise, the fact that the officials involved acted in a grossly negligent or reckless manner. This fact, in turn, has narrowed the issue in such cases, and consequently has narrowed the potential for adverse impact on the government because of the limited nature of the liability.

It is easy to state that the panel opinion, if upheld, will create liability every time a dangerous person is released; but this is simply not the case. The case law clearly demonstrates that the issue does not arise unless and until the alleged negligence of the releasing authorities rises to a level of gross, reckless or unreasonable conduct about which rational minds could not differ.

In support of this contention we offer the following summary of the factual situation (involving the known background of the releasee) in the major negligence-in-release cases. We emphasize that we are citing these cases to indicate the quantum of gross negligence or reckless or unreasonable conduct in the release which was the basis of each lawsuit. Phrased another way, we believe the factual situations described demonstrate that lawsuits are not brought simply because of the fact of release, but, rather because, upon any objective standard of analysis, the person released was so patently dangerous and presented such a clear threat to society that no reasonable person would have released him.

- The instant case, Payton v. United States, 636 F.2d 132 (5th Cir. 1981), Whisenhant, the releasee, was serving a 20 year sentence for the ". . . severe and brutal beating . . ." of a female. 636 F.2d at 134. Whisenhant ". . . manifested his continued homicidal tendencies by threatening the life of the only female with whom he came in contact, an employee of the federal penitentiary at which he was incarcerated." 636 F.2d at 134. Whisenhant ". . . was repeatedly diagnosed as psychotic and described as suffering from schizophrenia, paranoid type. His mental condition was noted as agressive and chronic, severe, and manifested by brutality and assaultive behavior." 636 F.2d at 134. Significantly, for purposes of our argument herein, a psychiatrist testified, at the trial of Whisenhant for the rape, murder and mutilation of appellants' decedent, that ". . . as a homicidal psychotic his release on parole was previous error bordering on gross negligence." 636 F.2d at 135. Despite all of the foregoing, Whisenhant was released after serving roughly one-third of his sentence, and he then raped, murdered and mutilated the bodies of three women.

- Martinez v. California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). The releasee in this case, Richard June Jordan Thomas, murdered a 15-year old girl in San Diego, California. In the words of the Supreme Court, Thomas ". . . was convicted of attempted rape in December of 1969. He was first committed to a state mental hospital as a "Mentally Disordered Sex Offender not amenable to treatment", and thereafter sentenced to a term of imprisonment of 1 to 20 years with a recommendation that he not be paroled. Nevertheless, five years later [the California parole authorities] decided to parole Thomas to the care of his mother. They were fully informed about his history, his propensities, and the likelihood that he would commit another violent crime." Martinez v. California, supra at 279.[3]

- Folliard v. Semler, 538 F.2d 121 (4th Cir. 1976), cert. denied, 429 U.S. 827, 97 S.Ct. 83, 50 L.Ed.2d 90 (1976). John Gilreath had received a 20-year prison sentence for the abduction and molesting of a young girl at the Madeira School in Northern Virginia. The sentencing judge modified the sentence to the effect that Gilreath be placed in a secure psychiatric facility and not be released without prior order of the court. Gilreath's psychiatrist and probation officer, however, placed him on out-patient status without consulting the court, whereupon he returned to the Madeira School and murdered 14-year old Natalia Semler.

- Grimm v. Arizona Board of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977). Mitchell Thomas

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[3] Martinez reached the United States Supreme Court on the victim's family's contention that California's statute conferring blanket immunity for *any* decision to parole a prisoner, Cal. Gov't Code §845.8 (West.), was violative of the Due Process clause of the federal constitution and of the Civil Rights Act, 42 U.S.C. §1983. The Court refused so to rule. Martinez will be discussed in more detail *infra*; here it is cited for its factual content.

Blazak, a convict with an extensive prior record, was confined in the Arizona State Penitentiary for armed robbery and assault with intent to kill. Blazak's psychiatric evaluation report stated that he was ". . . an extremely dangerous person who should not be free in society until some major psychological changes take place. He is a paranoid schizophrenic whose psychosis prevents him from distinguishing right and wrong and from controlling his conduct. He has never made an adjustment to society for any prolonged period and is unlikely to change. He has a definite potential for violence." 564 P.2d at 1230. Despite this warning, Blazak was paroled after serving one-third of his sentence and subsequently murdered Mr. Grimm in the course of an armed robbery.

- Thompson v. County of Alameda, 167 Cal. Rptr. 2d 70, 614 P.2d 728 (1980). This case involved the release from custody of a decidedly dangerous young man, James Foreman Fisher, III, by the Alameda County authorities. The County knew that Fisher had ". . . latent, extremely dangerous and violent propensities regarding young children and that sexual assaults upon young children and violence connected therewith were a likely result of releasing [him] into the community." 614 P.2d at 732. It also knew that Fisher had ". . . indicated that he would, if released, take the life a young child residing in the neighborhood." 614 P.2d at 733. Nontheless, the County released Fisher to the custody of his mother and within 24 hours he murdered plaintiffs' 5-year old son who lived a few doors away.

- Rieser v. District of Columbia, 188 U.S. App. D.C. 384, 580 F.2d 647 (1978), aff'g Rieser v. District of Columbia, 563 F.2d 462 (1977). Thomas Whalen had been accused of the murder of an 80-year old woman at the age of 13, sent to a mental institution, released, and then convicted of assault with intent to rape and robbery of a female cab driver. The psychiatrist's evaluation for trial release stated: "I believe that when released to the community he will pose a serious potential danger."

> 563 F.2d at 465. Whalen's probation officer and other District of Columbia officials caused him to be employed in an appartment complex catering mainly to young female government workers, despite the fact that they knew at the time that he was a prime suspect in the murder of a mother and her daughter. Whalen raped and murdered plaintiff's daughter at the apartment complex where he was employed.

In their factual settings, these cases are typical of third-party lawsuits against custodial officials. Even a cursory reading of the cases indicates the common thread running through all of them, whether recovery was allowed or not: that in each case the releasing authorities knew or should have known that the releasee was highly likely to victimize again. This, we submit, has institutionalized into the body of law the concept of gross negligence or reckless conduct concerning the release of prisoners. Counsel for Amici know of no case in which liability for release has been found that did not present facts similar to those cited above in which the foreseeability of harm to society was adequately demonstrated.[4] Accordingly, if the standard of care applied by the courts to such a case is that of gross negligence rather than mere judgmental error, it it unlikely that the panel opinion will open up a "Pandora's box" leading to a multiplicity of lawsuits.

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[4] Indeed, in Frank v. Pitrie, 353 So.2d 1293 (La. 1977) the Supreme Court of Louisiana excused a Parish (County) Sheriff from liability because of the non-foreseeability of the injury complained of. Sheriff Elin Pitrie of Evangline Parish had in his custody L. J. Dick charged with burglary and parole violation upon a former sentence for burglary. The Sheriff gave Dick a "weekend pass" from jail; Dick went into town got drunk and shot Chester Frank, a police officer. The Court held that the release of a prisoner, confined for a non-violent, bailable offense, burglary, while perhaps negligent, was not the proximate cause of plaintiff's injury at the hands of the releasee because his act of violence in shooting the officer was not foreseeable.

Additionally, this position is entirely consistent with the Restatement of Torts (2d) #319 (1965):

> One who takes charge of a third party whom he *knows or should know* to be likely to cause bodily *harm to others if not* controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. (Emphasis added.)

If this case had involved the early parole of a check forger, with no known propensity for violence, who then committed the terrible acts complained of, we doubt seriously the panel would have ruled as it did. The panel went to considerable pains to point out the totality of Whisenhant's record of which the Parole Board knew or should have known, and similar knowledge can be imputed to the defendants in each case cited in this section. While the panel did not couch its opinion specifically in terms of gross negligence, that theory is clearly implied. If, then, the "gross negligence" or "reckless conduct" standard is applied, there is nothing ". . . novel and unprecedented . . ." in the panel opinion as the Government contends (Suggestion for Rehearing *En Banc*, at 2), and this narrow standard of liability will not lead to a multiplicity of lawsuits.

The Government also raises, as a policy argument, the "chilling effect" theory:

> To impose liability for negligent parole determinations either upon the United States or upon the individual parole official, who is, of course, accountable to the Government he serves, would have a chilling effect on the decision-making [sic] process, impede implementation of experimental programs (such as the guidelines involved here), and in all probability, prolong incarceration unjustifiably for many prisoners. (Suggestion for Rehearing *En Banc*, at 14.)

The response to this contention is basically the same as our response to the ". . . novel and unprecedented . . ." or multiplicity of lawsuits claim by the Government discussed above. The Government describes its policy argument in terms of ". . . negligent parole determinations . . ."; however, as we have demonstrated with the examples cited in this section, the case law and the panel's opinion in the instant case turn upon concepts of gross negligence rather than the "second guessing" of good faith judgmental errors by correctional officials.

The Government urges that absolute immunity be accorded to parole officials, to the extent that even if they knew that Whisenhant would kill again, they should be protected from the consequences of their decision to release him. (Panel Opinion, 636 F.2d at 146.) Amici herein argue for a middle-ground, more balanced position: if the negligence in release is so gross as to "shock the conscience",[5/] if reasonable people could not differ over the fact that a release, which flies in the face of all expert advice as to the dangerousness of the individual proximately causes a tragedy, then, and only then, should the Government or its officials be held liable.

The panel wisely chose this balanced approach. Perhaps the crux of its decision lies in the following statement:

> There is ample room for vigorous governmental implementation of policies when the only limit placed upon such activities is that officials do not act in a manner so unreasonable that no sensible, well-intentioned person could accept it. 636 F.2d at 148.

We urge this en banc Court to uphold the balanced reasoning of the panel. The Government cites Martinez v. California, supra, as authority for its "chilling effect" position. It states, accurately enough, that the Supreme Court held that potential liability for release could inhibit parole innovations decided upon by a given state.

[5/] See Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952).

However, the Court, in Martinez specifically refused to pass judgment on the wisdom of California's blanket immunity statute:[6]

> As federal judges we have no authority to pass judgment on the wisdom of the underlying policy determination [of the California immunity statute]. Martinez v. California, supra at 283.

Martinez stands for the proposition that the Supreme Court was unwilling to superimpose the federal constitution upon a state immunity statute and, hence, declined to rule that California Government Code §845.8(a) was violative of either the Fourteenth Amendment or the Civil Rights Act, 42 U.S.C. §1983. The fact that the holding in Martinez was based solely on federal/state comity and statutory interpretation is underscored by the following disclaimer issued by the Court:

> We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole. Martinez v. California, supra at 285.[7]

Thus, we submit that the Government's reliance on Martinez for the proposition that the independence of parole decision-making policy must be protected by absolute immunity is misplaced.

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[6] Cal. Gov't Code, §845.8(a) provides that:

> Neither a public entity nor a public employee is liable for:
> (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.

[7] See also Sellars v. Procunier, ___ F.2d ___, 29 Cr.L. 2135 (9th Cir. 1981), in which the United States Court of Appeals for the Ninth Circuit held that parole officials have absolute immunity in civil rights actions under 42 U.S.C. §1983 wherein a decision adverse to an inmates seeking release on parole is made, but the Court stated, in addition:

> We leave to another day the question whether parole board officials enjoy any immunity from civil rights suits brought by persons injured by a dangerous parolee. CF. Grimm v. Arizona Board of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977).

As the law stands now, and as the panel held, the independence of parole authorities in making decisions whether or not to release is circumscribed only by the admonition that such a decision is not ". . . so unreasonable that no sensible, well-intentioned person could accept it." 636 F.2d at 148. *Amici* cannot fathom why such a reasoned, balanced test could possibly have a "chilling effect" on parole decisionmaking. Such a test demands no more of any parole official than is already mandated by statute, 18 U.S.C. §4203(a) (1969) which provides, *inter alia*, that parole release is conditioned upon the:

> . . . reasonable probability that such prisoner will live and remain at liberty without violating the laws, *and if in the opinion of the Board such release is not incompatable with the welfare of society*. (Emphasis added.)

Finally, *Amici* note that while the Government makes dire, and in our opinion unfounded, predictions about the consequences for independent parole decisionmaking if the panel opinion is upheld, the Government says no word about the possible beneficial effects of the panel's finding of liability (confined to cases of gross negligence) upon the safety of society. "Accountability" is the key word in this area. The loss of three human lives because the Parole Board acted in a grossly negligent, unreasonable manner in freeing Whisenhant simply cannot be shrugged off as the price we must pay for living in a rather permissive society. The panel opinion addressed this question directly and forcefully:

> There are, of course, positive aspects to the imposition of liability. *Accountability acts as an incentive for professional and efficient administration*. Government employees should as a result, and consistent with the statutory duty imposed on them, tend to aritculate a basis for their decisions *which serves the needs of society* as well as those of the individual person and not act in an unbridled fashion. (Emphasis added.) 636 F.2d at 148.

This same accountability-oriented approach was taken by the

Supreme Court of Arizona in its landmark decision in Grimm v. Arizona Board of Pardons and Paroles, supra. Grimm has been cited above in this brief in our listing of what kinds of third-party cases reach the courts (supra, p. 11). The case involved the wrongful death action of the wife of a man who was murdered during an armed robbery by a man who had been released from confinement by the Arizona Board of Pardons and Paroles under grossly negligent circumstances. In holding that, in the circumstances of the case, the Arizona Board members were not absolutely immune from the consequences of their release of such a dangerous prisoner, the Arizona Supreme Court stated that:

> While society may want and need courageous, independent policy decisions among high level government officials, there seems to be no benefit and, indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every public offical who exercises discretion. The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their outrageous conduct. There may even be some deterrent value in holding officials liable for shocking, outrageous actions. In any case, democracy by its very definition implies responsibility. [Citation omitted.] In this day of increasing power wielded by governmental officials, absolute immunity for non-judicial, nonlegislative officials is outmoded and even dangerous. 564 P.2d at 1233.

Amici are well aware of the difficulties facing correctional officials in today's disordered society. We emphasize that this brief does not advocate the "second guessing" of parole board members or wardens every time they make a judgmental error. We do suggest, however, that in cases such as this one, where custodial officials act unreasonably, recklessly, or in a grossly negligent manner to free individuals who are patently dangerous, then they should be held accountable for the tragic consequences of such action. This is precisely the approach taken by the panel in this case and we urge that their opinion be upheld.

CONCLUSION

Amici submit that the standards of gross negligence, reckless conduct, or "unreasonable conduct," (636 F.2d at 148) of government custodial officials be applied to predicate liability in cases such as the instant one. The application of such standards narrow the concept of liability in a reasonable manner, and would result in neither a multiplicity of lawsuits or a "chilling effect" on the independence of parole decisionmaking.

Standards of parole decisionmaking as are now in effect clearly mandate the safety of society and the middleground where reasonable minds could not differ as to the release of an individual. Such decisions should be made on expert advice as to the potential dangerousness of an individual, and cannot flagrently disregard expert advice as to the danger of release. Ignoring potential danger in the factual setting of this case should permit a plaintiff to test the question of liability before a fact finder.

The panel elavated the value of human life above the formalistic concepts of whether an act was "discretionary" or not. We urge this Court to uphold that panel opinion.

Respectfully submitted,

Wayne

WAYNE W. SCHMIDT, Esq.
Counsel of record
for amici curiae

Of Counsel:

FRANK CARRINGTON, ESQ.
CRIME VICTIMS LEGAL ADVOCACY INSTITUTE, INC.
F & M Bank Building, Suite 9
210 Laskin Road
Virginia Beach, Virginia 23451

DAVID T. AUSTERN, ESQ.
NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, INC.
Suite 503
918 Sixteenth Street, N.W.
Washington, D.C. 20006

WAYNE W. SCHMIDT, ESQ.
AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.
Suite 207-209
501 Grandview Drive
San Francisco, California 94080

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief, *Amici Curiae*, in Support of Plaintiffs-Appellants, by the Crime Victims Legal Advocacy Institute, Inc.; the National Organization for Victim Assistance, Inc.; and Americans for Effective Law Enforcement, Inc., were delivered by hand, expenses prepaid, to Thomas S. Martin, Acting Assistant Attorney General, Room 3617, Department of Justice, Washington, D.C. 20530, W. A. Kimbrough, Jr., United States Attorney, P.O. Drawer E, Mobile, Alabama 36601, Anthony J. Steinmeyer, Room 3621, Department of Justice, Washington, D.C. 20530, Eloise E. Davies, Room 3409, Department of Justice, Washington, D.C. 20530, Attorneys for the United States; and one copy of the foregoing to Leon Kelly, Jr. and Edward L. Hardin, Jr., P.O. Box 1214, Birmingham, Alabama 35201, Attorneys for Plaintiffs-Appellants, on this 14th day of July, 1981.

David T. Austern
DAVID T. AUSTERN

Senator **Laxalt**. We will now have testimony on the victim impact statement. We have Hon. Edward Northrop, senior U.S. district judge, of Baltimore, Md., and Paul Falconer, chief U.S. probation officer, District of Maryland.

Gentlemen, would you kindly step forward? I would like to thank both of you because I guess if there are any pioneers in connection with the impact statement and raising the level of public authorities and the public generally, it has probably been the two of you. We commend you for that and look forward to your testimony.

STATEMENTS OF EDWARD S. NORTHROP, SENIOR U.S. DISTRICT JUDGE, BALTIMORE, MD.; AND PAUL R. FALCONER, CHIEF U.S. PROBATION OFFICER, DISTRICT OF MARYLAND

Judge **Northrop**. Thank you, Mr. Chairman.

I think, if you don't mind, Senator, I would like to make an introductory statement and then have Mr. Falconer, our chief probation officer, give his statement and then answer any questions you might direct to me. I think it is necessary at this time that you really get a definitive exposition of how we use the victim impact statement.

Preliminarily, in answer to what Mrs. Geraldine X had to say, the victim impact treatment was started so that the victim would not be overlooked, and we think that is psychologically one of the most important elements of the concept.

When the victim impact statement was initiated in the District of Maryland, I was chief judge and a member of the probation committee of the Judicial Conference of the United States. Mr. Paul Falconer, presently chief U.S. probation officer for the District of Maryland, was one of the three people who initiated the plan for the victim impact statement and drew up the proposal and promulgated the rules adopted by the U.S. District Court for the District of Maryland for inclusion in the presentence reports.

Mr. Falconer has filed a statement, and he will speak today concerning the genesis of the victim impact statement, how it is used in Maryland, and the effect of its inclusion upon the workload of the probation department in Maryland, which I know is of interest to you.

Insofar as the judges are concerned, I can only speak for myself, but I am sure that my colleagues would confirm what I say in reference to it. While, in many instances, the impact of the crime upon the victim has been brought out in one manner or another during the trial, the statement of the victim included in the presentence report helps to refresh our recollection.

Of course, even prior to the victim impact statement, we have required restitution where at all practicable. However, the victim impact statement assists us in tailoring our sentence to effect some restitution.

Senator **Laxalt**. Has that been a problem at all, even doing the work on it?

Judge **Northrop**. No. I think Mr. Falconer will answer that. We have used it for quite a time.

As a matter of fact, he will report to you that there is some $350,000 in restitution that they are working on right now. That is a sizable amount of money in view of the limited use we can make of restitution under the Federal law.

Let me say in connection with the testimony of Geraldine X concerning the delay in the trial that the Congress of the United States passed the Speedy Trial Act some time ago. So that a trial occurs in the Federal court in roughly 70 days from the day that the man is indicted. There is really no delay. Maryland has a similar Speedy Trial Act that was passed some time after the episode referred to by Geraldine X here today.

So that not only do trials proceed rapidly over in our district and in other districts of the United States, but also our U.S. attorney has a way of treating victims which in every way is meeting the criticism that she leveled at the prosecution at the State level.

I am sure the State has taken that into consideration now, and as I hear from time to time from my colleagues on the State bench and people in the law enforcement system, they are looking toward easing the effect on the victim.

One fact that seems to me most important is that it is of some solace to us to find that the victim of a crime is at last receiving minimum attention for the harm which has been inflicted upon him. So much attention has been given to the rights of the convicted defendant that, in many instances, the harm he has inflicted is forgotten.

I commend this committee for taking into consideration this matter. I think that your activity here today is certainly directed at achieving a balance between the rights of the criminal and those of the victim.

Mr. Falconer's statement goes into detail. I think it will answer some of the questions that you have asked.

Senator **Laxalt**. Thank you very much.

Mr. Falconer?

Mr. **Falconer**. Good morning. My name is Paul Falconer, and I am the chief U.S. probation officer for the District of Maryland. I am here to speak in favor of the provision of S. 2420 which amends subsection (c)(2) of rule 32 of the Federal Rules of Criminal Procedures to provide for inclusion in presentence investigation reports prepared for Federal district judges of a victim impact statement.

The victim impact statement consists of a firsthand statement of the human victim of a Federal offense to the investigating U.S. probation officer and that officer's assessment of the financial, social, psychological, and medical impact upon and cost to the victim.

The victim impact statement enriches the presentence report by providing to the judge information of a type and quality provided by no other means. It allows the victim of the offense some privilege of allocution at the sanctioning phase of the proceedings. By supplying correct and verified information concerning amounts of financial losses to the victim, it makes a more accurate restitution decision possible.

It raises at least the possibility of additional counseling or assistance by an official government agency for the victim, within carefully prescribed limits. Finally, in a controlled and limited way, it restores the victim to a legitimate role in the criminal justice system without handicapping the prosecution or interfering with the rights of the accused.

It seems particularly appropriate that responsibility for a victim impact statement should reside with the probation service. The Federal probation system through its fully qualified and professional staff has an easy familiarity with and access to criminal justice information. It is a nationwide system with a built-in knowledge of and access to local resources and it is casework oriented and universally recognized for impartiality.

In the District of Maryland the Federal judges ratified a proposal for utilization of a victim impact statement in presentence reports in May 1979. Since that time, such a statement has been systematically included in every presentence report where there has been a human victim. The program got off to a deliberate start in 1979 when only seven victim impact statements were utilized. This number grew to 64 during 1980 and that figure was more than doubled to 112 during 1981. Thus far during 1982, utilization of a victim impact statement is running some 23 percent ahead of last year. It is clear that the staff has recognized the value of the enrichment of the presentence report and is more alert to opportunities to utilize it.

Utilization of the victim impact statement has not added significantly to the task of the probation officer in preparing the presentence report. We would estimate that perhaps an additional hour of preparation time is required in interviewing the victim and assessing the impact. Acceptance by the bench has been uniformly positive. Members of our highly competent and aggressive Federal public defender's office have acknowledged the fairness and impartiality of the victim impact statements, while accepting the fact that they carry a potential for making their task more difficult.

The process of preparing a victim impact statement is undertaken primarily to enrich the presentence report with victim-oriented information. Simultaneously, though, it makes possible further services or considerations for the victim, which can include occasions when the probation officer may mediate employment problems for a victim when that person loses time at work due to offense-related injuries or losses; intervene with the victim's creditors if the offense caused financial problems; help and advise the victim to apply for compensation, if eligible under local law; and notify the victim of the outcome of the prosecution.

The victim of an offense has no standing in the court beyond the status of a mere witness—he has no right of allocution and is often overlooked in the process of plea negotiation. Our position is that we should not prosecute, try, and sentence any defendant without at least listening to the victim and giving some consideration to the victim's offense-related needs. It is essential that a victim impact statement be factual and confirmed; it must be noninflammatory and nonargumentative. We never want to be guilty of waving the bloody shirt; neither are we to bury the bloody shirt with the victim still in it.

I have attached to your copies of this statement the original proposal which has been ratified and in effect since May 1979 in the District of Maryland, where it has been virtually unopposed and where it has prompted favorable national attention. I am grateful for the opportunity to tell you about it and I welcome your questions or comments.

Senator **Laxalt**. Thank you very much, Mr. Falconer, not only for your testimony, but I suppose if the federal system was full of people like you and the judge, we wouldn't have any need for legislation at all, because you have done it on the basis of being self-starters.

You had an opportunity, I suppose, both of you, to examine the proposed legislation, particularly with respect to the victim's impact portion. Is that part of our legislation generally acceptable to the two of you? Does it do the job? That is what I am talking about.

Judge **Northrop**. Yes; I think it does.

Senator **Laxalt**. That, you think, would do the job?

Judge **Northrop**. Yes.

Mr. **Falconer**. As far as the victim impact statement, I believe it is an overdue aspect, and I believe it would do the job.

Senator **Laxalt**. Tell me, as a matter of education within Federal circles in terms of seminars and meetings that you have, or in the conferences, judge—I have had occasion, as I indicated before, to participate from time to time in these meetings because of my prior background. I have never known of any concentrated attention to be given to this problem. Is that changing?

Judge **Northrop**. I think it is, Mr. Chairman. You asked a question a while back about the education that a Federal judge goes through and the various people like the probation department.

We have sentencing institutes at least once a year, and as you probably attended yourself at one time, and this question has arisen there, and it has been given some attention.

Now, Mr. Falconer, of course, when they promulgated our victim impact statement, had learned of it at a seminar. Is that correct? You might tell the Senator about that.

Mr. **Falconer**. Yes. The idea is not original. The idea originated with an organization called Improving Victim Services Through Probation, and an institute which was sponsored by them and jointly by the Blackstone Institute, the American Probational Parole Association and the National Institute of Justice.

The purpose of the meeting was to sensitize persons from probation departments on both a State and a local and a national level to the value of improving services to victims in the context of a probation department, and one of the seminal ideas was the use of a victim impact statement.

It has been a very modest undertaking. Obviously, it is something that could be abused if it were overdone. We have tried to keep it very modest and very much under control, and as a result I think it has met with wide acceptance and I think it enriches the presentencing report in a very valuable way.

Senator **Laxalt**. All right.

Judge **Northrop**. I think you might wish to hear about restitution as it has been used in Maryland and as we are using it now.

Senator **Laxalt**. We would like to have that for the record.

Mr. **Falconer**. I can refer to it. Section 3651 of title 18 of the United States Code makes possible the institution of restitution at the time of sentencing.

My experience has been in the District of Maryland that the judges are very alert to opportunities to require and to see that restitution is collected from offenders who are placed on probation and the restitution payments are ordinarily made through the probation department.

Now, we also have the responsibility of collecting Federal fines. I think at any given time we have something in excess of $350,000 in outstanding fines and restitution which we are collecting through the probation department.

So the judges are sensitive to the need and the possibility of ordering restitution. If there is a shortcoming in the idea of restitution, it is that restitution is not ordered when confinement is ordered. I have never seen a parole order which has required restitution.

This is a possible weak area, but I believe as far as the Federal judges and restitution are concerned, restitution is well employed in the Federal courts in the area or probation.

Senator LAXALT. Thank you very kindly, gentleman. I am sorry that it ran so late, but sometimes it is an unavoidable situation. We appreciate both of you being here.

I know you are busy men, coming here as you did this morning.

Mr. FALCONER. Thank you.

[The prepared statements of Judge Northrop and Mr. Falconer, with accompanying documents, follow:]

PREPARED STATEMENT OF EDWARD S. NORTHROP

My name is Edward S. Northrop, and I am a senior judge of the United States District Court for the District of Maryland. When the Victim Impact Statement was initiated in the District of Maryland, I was then Chief Judge and a member of the Probation Committee of the Judicial Conference of the United States. Mr. Paul R. Falconer, presently Chief United States Probation Officer for the District of Maryland, was one of the three people who initiated the plan for the Victim Impact Statement and drew up the proposal and promulgated the rules adopted by the United States District Court for the District of Maryland for inclusion in the presentence reports in May of 1979. Mr. Falconer has filed a statement and will speak today concerning the genesis of the Victim Impact Statement, how it is used in Maryland, and the effect of its inclusion upon the workload of the Probation Department in Maryland.

Insofar as the judges are concerned, I can only speak for myself, but I am sure that my colleagues would confirm what I say in reference to it. While, in many instances, the impact of the crime upon the victim has been brought out in one manner or another during the trial, the statement of the victim included in the presentence report helps to refresh our recollection of what occurred. Of course, even prior to the Victim Impact Statement, we have required restitution where at all practicable. However, the Victim Impact Statement assists us in tailoring our sentence to effect some restitution.

Where there has been a particularly brutal assault on a federal reservation, the Statement can be reflected in the sentence imposed. The Victim Impact Statement is of material assistance to us, and, as has been shown by Mr. Falconer, it is receiving increasing use.

The one factor of it that seems to me to be most important, is that it is of some solace to us to find that the victim of a crime is at least receiving minimum attention for the harm which has been inflicted upon him. So much attention has been given to the rights of the convicted defendant that, in many instances, the harm he has inflicted is forgotten.

The statement is at the least a gesture toward achieving a balance between the rights of the criminal and those of the victim.

PREPARED STATEMENT OF PAUL R. FALCONER

My name is PAUL R. FALCONER and I am the Chief United States Probation Officer for the District of Maryland. I am here to speak in favor of the provision of Senate Bill 2420 which amends Subsection (c)(2) of Rule 32 of the Federal Rules of Criminal Procedures to provide for inclusion in presentence investigation reports prepared for Federal District judges of a VICTIM IMPACT STATEMENT.

The VICTIM IMPACT STATEMENT consists of a firsthand statement of the human victim of a Federal offense to the investigating United States Probation Officer and that officer's assessment of the financial, social, psychological and medical impact upon and cost to the victim.

The VICTIM IMPACT STATEMENT enriches the presentence report by providing to the judge information of a type and quality provided by no other means. It allows the victim of the offense some privilege of allocution at the sanctioning phase of the proceedings. By supplying correct and verified information concerning amounts of financial losses to the victim it makes a more accurate restitution decision possible. It raises at least the possibility of additional counseling or assistance by an official government agency for the victim, within carefully prescribed limits. Finally, in a controlled and limited way, it restores the victim to a legitimate role in the criminal justice system without handicapping the prosecution or interfering with the rights of the accused.

It seems particularly appropriate that responsibility for a VICTIM IMPACT STATEMENT should reside with the Probation Service. The Federal Probation System through its fully qualified and professional staff has an easy familiarity with and access to criminal justice information. It is a nationwide system with a built in knowledge of and access to local resources and it is casework oriented and universally recognized for impartiality.

In the District of Maryland the Federal Judgesratified a proposal for utilization of a VICTIM IMPACT STATEMENT in presentence reports in May 1979. Since that time, such a statement has been systematically included in every presentence report where there has been a human victim. The program got off to a deliberate start in 1979 when only 7 VICTIM IMPACT STATEMENTS were utilized. This number grew to 64 during 1980 and that figure was more than doubled to 112 during 1981. Thus far during 1982, utilization of a VICTIM IMPACT STATEMENT is running some 23% ahead of last year. It is clear that the staff has recognized the value of the enrichment of the presentence report and is more alert to opportunities to utilize it.

Utilization of the VICTIM IMPACT STATEMENT has not added significantly to the task of the probation officer in preparing the presentence report. We would estimate that perhaps an additional hour of preparation time is required in interviewing the victim and assessing the impact. Acceptance by the bench has been uniformly positive. Members of our highly competent and aggressive Federal Public Defender's Office have acknowledged the fairness and impartiality of the VICTIM IMPACT STATEMENTS, while accepting the fact that they carry a potential for making their task more difficult.

The process of preparing a VICTIM IMPACT STATEMENT is undertaken primarily to enrich the presentence report with victim-oriented information. Simultaneously though, it makes possible further services or considerations for the victim, which can include occasions when the probation officer may:

=mediate employment problems for a victim when that person loses time at work due to offense-related injuries or losses

=intervene with the victim's creditors if the offense caused financial problems

=help and advise the victim to apply for compensation, if eligible under local law

=notify the victim of the outcome of the prosecution.

The victim of an offense has no standing in the Court beyond the status of a mere witness - he has no right of allocution and is often overlooked in the process of plea negotiation. Our position is that we should not prosecute, try and sentence any defendant without at least listening to the victim and giving some consideration to the victim's offense-related needs. It is essential that a VICTIM IMPACT STATEMENT be factual and confirmed; it must be non-inflammatory and non-argumentative. We never want to be guilty of waving the bloody shirt; neither are we to bury the bloody shirt with the victim still in it.

I have attached to your copies of this statement the original proposal which has been ratified and in effect since May 1979 in the District of Maryland, where it has been virtually unopposed and where it has prompted favorable national attention. I am grateful for the opportunity to tell you about it and I welcome your questions or comments.

ENCLOSURE

CTIM SERVICES PROGRAM

Introduction

An increasing interest in the role of the victim in the administration of justice is prompting novel proposals and forcing a reexamination of principles. Corollary to increased victim awareness is a growing interest and preoccupation with restitution, both specific and general.

The idea of restitution is not novel - it originated in primitive cultures (and still exists there) where its rationale is one of retribution. A rehabilitative rationale for restitution was a modern invention and since this rehabilitative ideal has lost much of its force and we are observing a return to a retributive/deterrence model, it is interesting to observe the principle of restitution as strong as ever, and even experiencing a sort of re-birth in many jurisdictions. Victim consciousness has not fared as well historically.

True, the primitive idea of restitution envisioned the blood payment to the victimized person or his heirs and assigns, but as primitive culture became more sophisticated - and the list of criminally proscribed acts lengthened - it became fashionable and profitable for the political or religious establishment to stand in the place of the injured party and the role of the actual victim diminished in the criminal process. With the dawning of the New Penology, indeed, the state pre-empted this role and the actual victim was reduced to the status of a mere witness in the proceeding. Such a diminution of the victim's role was essential in a scheme which purported to be based upon a theory of rehabilitation as it was necessary to avoid any appearance of a retributive element. How better to do this than to regard the victim as a somewhat embarrassing necessity.

Perhaps the collapse of the rehabilitative model changed that, but along with the resurgence of retributive/deterrent approaches has come an increased awareness of the victim of crime and a feeling that he has a definite role in the criminal justice process.

Argument

The victim has too long been ignored in the criminal process and simple justice which demands enlightened and even gentle treatment of the accused/convicted criminal mandates that the interests of the victim be given at least token consideration.

No return to the institution of the vendetta is proposed, but merely that the victim, through an orderly and dignified procedure, be afforded some right of allocution and that some consideration of the victim's damages and needs be taken into account at the sanctioning phase of the criminal process. In addition to an increased fairness in the process, such a procedure would probably yield a higher level of accuracy in reports of the offense to the Court.

Proposal

Establishment of a modest program in the Probation Department to heighten the awareness of the Probation Officers and the Court to the plight of the victim is recommended. The program would be essentially educational and would require no additional staff or expenditure of funds and would make minimal demands upon the investigative time of Probation Officers.

The heart of the program would be the inclusion in the presentence report of a "VICTIM IMPACT" section, which would contain in verified and non-argumentative style, an assessment of the financial, social and psychological cost to the victim of the offense.

Initially, the program would be confined to human victims only and for practical reasons only victims of the offense or offenses for which conviction was had.

Outline

GOALS - Respond to the victim's crime related needs

OBJECTIVES - Enrichment of presentence report with victim's version of the crime and its effects upon him; improve on department's professional needs through a better understanding of the defendant and the ability to fashion appropriate recommendations to the court.

STAGE AT WHICH SERVICES ARE RENDERED - Between the entering of a guilty plea (or conviction) and the imposition of sentence and possibly through a subsequent period of supervision.

SERVICES - For example: contact with victim's creditors to mediate problems; mediation of victim's employment problems; return of property to the victim; aid victim in filing for compensation under appropriate legislation; explanation of criminal justice procedures to victim, etc.

SERVICE PROVIDERS - U.S. Probation Staff and volunteers.

NEW RESOURCES - None.

Practical Considerations

No services to victims will be forced. Non-cooperation or disinterest on the part of the victim would close our interest in the case insofar as the victim is concerned although this would not preclude enforcement of any court-ordered restitution as in any case.

The victim would not become a "case". One interview would suffice in most cases although there might arise a need for additional contacts with other persons with a creditor or employer relationship with the victim. Additional advice or instructions can be furnished the victim through mail or be phone.

Appendix I

Examples of VICTIM IMPACT statements

Outline

a) Identification of victim

b) Itemization of unremunerated tangible loss, if any

c) Probation Officer's assessment of social and psychological damages, if any

VICTIM IMPACT STATEMENT: (Dyer Act Offense)

Mr. Charles W. Jones, 1234 Kossuth Street, Baltimore, was the victim of this offense. His 1977 Plymouth station wagon was stolen by the defendant from in front of his house and was recovered in damaged condition in Charlotte, North Carolina three says later.

Although covered by insurance against loss, Mr. Jones was not compensated by his insurance company since the car was recovered. Damages included two flattened tires which he had to replace before he could bring the car home. Further, Mr. Jones had to travel to Charlotte, North Carolina at his own expense, thereby losing a day of work, in order to pick up his car. His certified itemization of the expenses involved is as follows:

Bus Ticket to Charlotte, N.C.	$23.50
Two tires at $42.75 each	85.50
Gasoline for return trip	17.00
Loss of 1 day work at rate of $6.70 per hour	53.60
	$179.60

VICTIM IMPACT STATEMENT: (Assault on Officer)

Officer Robert A. Galey, 79 Rushmore Place, Berwyn Heights, Maryland was the victim in this case. He sustained groin injuries and a hairline fracture of the skull as a result of being attacked by the defendant. His medical expenses were borne by the U. S. Park Police and he was on sick leave for 5 working days. He did not sustain any additional financial costs.

Since the incident, however, Officer Galey has been considering a change of vocation. His wife has expressed fears for his safety in carrying out the hazardous duties of a police officer and indicated that she is not sure she can continue to live with him with these worries.

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VICTIM IMPACT STATEMENT:
(Robbery on Government Reservation)

Miss Sharon Ann Jordan, age 19, Route 1, Box 475, Millersville, Maryland was the victim of this offense. Her handbag, containing $72.00 in cash and numerous personal papers was seized from her by force when the defendant accosted her in her car while waiting for a traffic signal on the Fort Meade reservation.

Miss Jordan suffered lacerations on her hand when the bag was torn from her grasp and had to seek medical attention for these injuries. She has certified that the monetary loss she sustained is as follows: $72.00 in cash; $10.00 for the handbag; and $10.00 for other personal property in her handbag. She has received a medical bill from the emergency room at the Kimbrough Army Hospital for $12.00 for accident room services incident to her injury. Total $104.00.

In addition, Miss Jordan was badly shaken by her experience. She has to travel across the military reservation frequently enroute to her job at the National Security Agency and she is very anxious about this and is considering looking for another job. She has also curtailed all of her former social activities which centered about the military reservation. She has been experiencing difficulty in sleeping and concentrating on her job.

VICTIM IMPACT STATEMENT: (Theft of Mail)

Mrs. Constance Vitriola, 13598 Pulaski Highway, Baltimore, Maryland 21162, Telephone - 335-9274, who is the defendant's sister-in-law as well as a victim along with her husband, told the Probation Officer that she and her husband do not want to be interviewed and have nothing to say about the checks which the defendant stole from them.

Senator **Laxalt**. Lastly, we have in from the American Bar Association Michael McCann. He is chairman of the Victims Committee of the American Bar Association.

Thank you very much for coming all this way, Mr. McCann, to help us out.

STATEMENT OF E. MICHAEL McCANN, DISTRICT ATTORNEY, MILWAUKEE COUNTY, WIS., AND CHAIRMAN, VICTIMS COMMITTEE, AMERICAN BAR ASSOCIATION

Mr. **McCann**. I am happy to appear here. I would ask that my full statement be included in the record.

Senator **Laxalt**. It is so ordered.

Mr. **McCann**. I have served as district attorney in Milwaukee County for the past 14 years. I have served on the Victims Committee of the American Bar Association's Criminal Justice Section since its inception 6 years ago. I presently chair the committee.

The American Bar Association represents some 275,000 attorneys in the United States. The Criminal Justice Section to which I belong has about 10,000 members. Despite the fact that its membership consists predominantly of defense attorneys, the section has consistently been in the forefront of speaking to the issue of victims' rights. Without apologizing for its involvement in protecting defendants' rights, it has stressed and willingly supported the Victims Committee's effort to articulate the rights and needs of the victim in the criminal justice system.

I have carefully gone over the legislation before us. The ABA supports, of course, the opening sections that speak to the needs and the problems of witnesses.

VICTIM IMPACT STATEMENT

With respect to the impact statement, I think legislation such as this requiring that victim problems be laid before a judge at the time of sentencing is long overdue. I would be most pleased to tell you that Mrs. Montgomery's story about the $350 restitution against an $11,000 medical is unique, but it is not. In fact, it is quite representative. One can immediately infer that the prosecutor, the probation department and the judge when the sentence was levied and the restitution was ordered, had no idea of the real loss of this lady.

Senator **Laxalt**. They should have been in touch with her. There is no way they could otherwise.

Mr. **McCann**. That is true. As a former prosecutor, you know the system. A victim impact statement could be required as part of the probation report. It is not that onerous and it could be done.

I want to point out that the ABA has recommended that the prosecutor contact the victim prior to engaging in plea negotiations. Had that been done in the Montgomery case, the prosecutor would have known what was required.

INTIMIDATION

I commend, also, the inclusion of the intimidation section. It parallels closely the model statute of the American Bar Association, which was developed by the Victims Committee after hearings in

June of 1979. Some 34 witnesses from around the country appeared here in Washington and advised our committee of the extent of the victim intimidation.

Senator Heinz' bill and the ABA model do differ in several aspects. Whereas Senator Heinz' bill treats even annoying pressures as felonies, the ABA recommends that, where there is no threat involved, but simply annoying efforts, that the crime be treated as a misdemeanor. This would be the case where a defendant, let's say, repeatedly contacts a victim, does not threaten or intimidate that victim, but repeatedly requests, or petitions in an annoying manner, the person to drop the case.

Most prosecutors would feel that a felony charge would be a draconian measure and would not institute a prosecution.

I would suggest that you consider adding a misdemeanor offense for use in such situations.

Senator LAXALT. What would you do in a situation like Geraldine X, receiving a letter?

Mr. McCANN. If there were threats of retaliation, such as "I am going to get you," I would say treat it as a felony. If it consisted of repeated letters petitioning her to drop the case, I would say a misdemeanor.

WITNESS RELOCATION

Threats to witnesses are terrifying, particularly to older persons and with respect to children. Sometimes it is only psychological support that is needed, not relocation. However, if a bureau realizes witness relocation is a responsibility that has been addressed in legislation, they will utilize it if necessary.

We have done it in Milwaukee. We have a population of over 1 million. For some $75,000, we have been able to do that. It is not a terribly expensive thing. Of course, it supports the cases of the prosecution.

Senator LAXALT. It is sparingly used because witness relocation is a tragedy all in its own in many, many cases, is it not?

Mr. McCANN. Yes, it is.

GUIDELINES FOR FAIR TREATMENT OF VICTIMS AND WITNESSES

I would like to speak as well to the proposed guidelines. I think it is important that you require them in this legislation. Senator Heinz raises a good point. Many of those issues have been touched upon in the Attorney General's Violent Crime Task Force report and elsewhere.

Chapter 950 of the Wisconsin statutes sets out guidelines for the treatment of victims and witnesses. Prosecutors, if they see them in the law, will abide by the law. They do not call for a great deal of expense.

Certainly, if the Department of Justice articulates similar guidelines, sensitive U.S. attorneys will follow those guidelines.

Therefore, I think this section should be included.

CRIME VICTIM COMPENSATION

I think there should be a study of the compensation programs as the legislation suggests. This may encourage those States that have not adopted such legislation to do so. Moreover, the Federal Government would have before it a thorough means for evaluating victim compensation programs in an intelligent and meaningful way.

American Bar Association representatives have appeared a number of times in past years to support crime victim compensation legislation, and of course continue to support it now.

THIRD-PARTY LIABILITY

There is no more articulate national spokesman for the issue of third-party liability than Mr. Frank Carrington. I am pleased to say that. The ABA itself has not taken a position on this issue. Though, at the direction of, section chairperson Judge Sylvia Bacon, our Victims Committee is presently studying it.

CIVIL REMEDIES

The civil restraint order that is suggested as part of the intimidation package, I think is important. We would advocate one modification. As it stands, the legislation provides that the civil order could be issued on hearsay. We would suggest that you include the word, as we did in the model law, "credible," so it becomes "credible hearsay."

I think that makes the section more palatable. I don't think it would impact negatively on the securing of such restraining orders.

CONCLUSION

Finally, I want to thank you for the attentive following that you have given to this bill. I think the witnesses who have appeared are a thorough cross-section. I don't think Geraldine X is someone who has been dredged up in an unusual case. The delays without notification to her, the difficulty in getting her input into the system, these are all too real. It is a real example, not an unusual one. It is sadly representative of what is happening today in both the Federal and the State systems.

Senator **Laxalt**. I am afraid you are right, Mr. McCann.

Thank you so much for coming in, and thanks for the help of the ABA and your section particularly. They have made a material contribution. You might indicate our obligation, and we will be in touch.

Mr. **McCann**. Thank you.

[The prepared statement of Mr. McCann and ABA summary follow:]

PREPARED STATEMENT OF MICHAEL McCANN

Mr. Chairman and Members of the Subcommittee:

My name is Michael McCann. I have served for the past fourteen years as the District Attorney of Milwaukee County, Wisconsin. I am presently Chairperson of the Victims Committee of the Criminal Justice Section of the American Bar Association. I am most honored to be here to set forth the views of the ABA on Senator Heinz' "Omnibus Victims Protection Act of 1982."

The position of prosecutor provides an overview of virtually the entire criminal justice system. The work of that office involves intense, daily contact with the victims and witnesses of crime. No prosecutor with any degree of sensitivity can long remain ignorant of the truly onerous and often frightening part such victims and witnesses play as the crime tragedy progresses from the stage of offense, through apprehension, identification, pretrial proceedings, and trial.

The woes of victims and witnesses are legion. To the weak, the infirm, and the elderly, the potential of offender retribution for aiding the prosecution is real, palpable, and even, on occasion, terrifying. Even to the strong and well-educated, the arcane, often labyrinthian procedures of the criminal courts are confusing and burdensome. Rather than a kind request to appear in court, the victim or witness receives a subpoena threatening him or her in imperious, medieval English, with swift, dire penalties for failure to appear in court. When the witness does appear, he or she frequently will wait long hours only to later learn that the proceeding will not go forward as scheduled but instead another appearance on a later date will be required.

The harried shopkeeper or the inflation-inflicted wage-earner reckoning his miserly witness fee against foregone income soon realizes that by his willingness to cooperate with law enforcement authorities, he or she has unwittingly undertaken to economically subsidize the criminal justice system. Restitution for losses sustained as a victim are most frequently not even considered by the court.

It is interesting to note that the parable of the Good Samaritan, proposed as the model of a caring neighbor, focuses on one person's effort to reach out and aid a crime victim--a robbed, beaten man. Two thousand years later, the story of the ignored, avoided, and abandoned victim is most often the rule rather than the exception daily in many parts of America--urban, suburban and rural alike.

The legislation under consideration addresses these problems. Steps can and ought to be taken to remedy such intolerable treatment of the victims and witnesses of crime. I am happy to state that many such steps have been taken in Milwaukee. It is my hope that adoption of the legislation under consideration will inspire changes not only in the federal system but will provide the model for all states in this land.

The American Bar Association represents 275,000 lawyers and 35,000 law students. Its efforts to protect the legitimate rights of defendants have been widely publicized. Less well known are its efforts over the past decade to improve the plight of crime victims and witnesses.

Most of the ABA's victim/witness-related activities have emanated from the Criminal Justice Section--an "umbrella" organization of some 10,000 prosecutors, defense attorneys, judges, civil practitioners and academicians. Subjects of the Section's earlier victim-oriented activities included crime victim compensation and revision of the rules of evidence in rape cases. In 1976, the Section formally recognized the importance of work in this area by establishing a Victims Committee.

Since then, the Committee has sponsored a nationwide bar activation project for victim/witness assistance, developed a package of recommendations to reduce victim/witness intimidation, and served as a national clearinghouse on statewide victim/witness legislation. We are currently working on a set of guidelines for fair treatment of victims and witnesses in the criminal justice system.

Other ABA sections, such as the Young Lawyers Section and the Section on Individual Rights and Responsibilities, have also been active in specialized areas of victim reform, such as child abuse and domestic violence.

The ABA's interest in victims and witnesses is motivated by both ideological and practical concerns. Ideologically, the criminal "justice" system owes justice to the victims and witnesses of crime the same as it owes justice to those accused and convicted of crime. On the practical side, victims and witnesses plan an indispensable role in our criminal justice system. As practitioners, we need to encourage their cooperation to the maximum extent possible.

Before I discuss ABA policies which relate to the specific bill before this subcommittee, I would like to mention at least one which pertains to several other victim-related bills pending before Congress. Since 1967, the ABA has been on record as supporting federal legislation compensating persons injured by criminal acts. In 1974, it endorsed the Uniform Crime Victims Reparations Act. Since then, the Association has actively promoted the adoption of both federal and state legislation in this area. We hope that Congress will finally approve a federal compensation bill this session.

The bill before us today is a most welcome one. While ABA policies do not address each and every provision of the Omnibus Victims Protection Act of 1982, we unhesitatingly endorse the findings and purpose of the proposed act. The fact that most crimes are state crimes in no way lessens the importance of federal legislation, both to provide justice to the victims of federal crime and to serve as a model for the states.

Title I of the proposed act would require a victim impact statement as part of the pre-sentence report. This is an area our Victims Committee has been discussing in connection with our proposed guidelines for fair treatment of crime victims and witnesses. Some concern has been expressed that interjection of a victim statement would upset the delicate balance of "state vs. defendant," resulting in longer sentences. However, there is precedent for consideration of the impact of the crime on the victim in several of the prestigious ABA Criminal Justice Standards.

For instance, Sentencing Alternatives and Procedures standard 18-3.2 calls for the court to sentence within an applicable guideline range unless certain aggravating factors are present. Such factors are present, according to the standard, (1) when a victim is particularly vulnerable; (2) when a victim is treated with particular cruelty; (3) when the offense involved injury or threatened violence to others committed to gratify the offender's desire for pleasure or excitement; or (4) when the degree of bodily harm caused, attempted, or foreseen by the offender was substantially greater than average for the given crime.

The Pleas of Guilty Standards also address the issue. Standard 14-3.1 urges the prosecuting attorney to make every effort to remain advised of the attitudes and sentiments of victims before reaching a plea agreement. According to standard 14-3.3, the judge may allow or require the victim to appear or testify prior to accepting a plea agreement.

Title II of the proposed act pertains to protection of victims and witnesses from intimidation. As previously noted, our Victims Committee has done substantial work in this area.

We have found intimidation to be a persistent problem with two unique aspects. It is the one crime in which only unsuccessful attempts are reported or discovered. It is also a crime which inherently thwarts the purposes of the justice system itself.

In June, 1979, our Victims Committee held two days of widely-publicized public hearings here in Washington, D.C. Their purpose was to provide a forum for victims, criminal justice practitioners and concerned citizens to comment on a draft "package" of recommendations to reduce victim/witness intimidation. The package contained a model statute as well as recommendations for police, prosecutors, the courts, community groups and the bar. Oral testimony of thirty-four witnesses was heard. Over eighty others submitted written testimony. A number of problem areas not addressed in the draft were raised at the hearings.

One of the most surprising of these was the wide extent of defense witness intimidation.

Following the hearings, the Committee revised the draft recommendations to address this and other concerns discussed at the hearings. In August of 1980, the entire package was approved by the ABA's policy-making House of Delegates.

To date, five states have adopted the model statute, including my own state of Wisconsin. We understand similar bills are under consideration in approximately a half dozen other state legislatures. It is difficult to measure implementation of the parts of the package addressed to individual law enforcement agencies, courts, community groups and bar associations. However, the literally thousands of requests we have received from such groups for copies of the recommendations lead us to believe there is considerable activity in this area.

Much of the intimidation section of the bill under consideration today comes directly from the ABA recommendations, particularly the model statute.

For instance, the bill's definitions of the terms "witness" and "victim" closely follow the ABA model. "Witness" includes not only a subpoenaed party. It also includes an individual who knows about the crime but has not been subpoenaed. Since such persons are often the target of intimidation--particularly immediately following the commission of the crime--the failure to cover them has significantly limited the effectiveness of most existing intimidation statutes.

The term "victim" is rarely found in existing statutes, probably because a victim is not considered a party to a criminal prosecution. It is true that most victims are also witnesses. This is especially so under the broadened definition of witness just mentioned. Nevertheless, separately defining a victim as an individual against whom an offense has been committed and including the victim under the scope of the act extends the law's protection from retaliation or attempted retaliation beyond the termination of the case.

Both the ABA model statute and the Omnibus Victims

Protection bill make it a crime to maliciously deter victims or witnesses from attending or testifying at criminal proceedings. Also proscribed are attempts to prevent them from (1) reporting the victimization to law enforcement officials; (2) causing a criminal prosecution to be sought; or (3) causing the arrest of a person in connection with the victimization.

Under the ABA model statute, such actions are classified as misdemeanors unless one or more of the following aggravating factors are present: (1) express or implied threat of violence; (2) intimidation in furtherance of a conspiracy; (3) commission of the crime for pecuniary gain or for any other consideration acting upon the request of any other person; and (4) commission of the crime by one previously convicted of intimidation.

Under Senator Heinz's bill, all substantive violations would be considered felonies, whether or not such factors are present. The sentence maximum would be higher, however, when there is force involved.

In any form, intimidation is a very serious matter. We suggest, however, that the wide range of possible forms it may take warrants both misdemeanor and felony classifications.

Neither the ABA recommendations nor the Omnibus Victims Protection Act differentiate between attempts to intimidate and successful intimidation. Indeed, the ABA model statute affirmatively states that there should be no such differentiation. The fact that no person was injured physically or, in fact, intimidated, is no defense against prosecution under the ABA statute. While the Committee recognized this provision as contrary to most states' general laws of attempt, we also recognized that few successful intimidation cases are ever prosecuted.

The omnibus bill provides a separate section on retaliation resulting in bodily injury or property damage, though the maximum punishment imposed is no more than that for intending to tamper with a witness.

Both the ABA recommendations and Senator Heinz's bill provide that the pretrial release of defendants include a condition that the defendant not commit any act of intimidation proscribed.

by the legislature. This section broadens the potential for revoking pretrial release of defendants to those situations in which there was no pre-existing order. Our Committee is aware that certain states consider the sole purpose of pre-trial bail to be to ensure the defendant's appearance at trial. Most, however, take the broader view of ABA Pretrial Release standard 10-5.2 (iii) and (v) which expressly authorizes such conditions upon defendants.

Civil remedies to restrain witness or victim intimidation are included in both the ABA model statute and the omnibus bill. In both, these may be initiated at the request of either the government or defense counsel. Under the ABA recommendations, the court may also initiate such actions upon good cause, including "credible hearsay." The omnibus bill requires a lesser standard of unqualified "hearsay" for the Attorney General to initiate a civil proceeding. We urge that the bill be amended to parallel the ABA model, that is, to require that hearsay as a basis for court orders be "credible."

Under both the ABA model statute and the omnibus bill the court may order a defendant, a witness or other person connected with the case to: (1) refrain from engaging in activities proscribed by the legislation; (2) maintain a prescribed distance from a specified victim or witness; or (3) refrain from communicating with a specified victim or witness except under such conditions as the court may impose. The ABA commentary specifically points out that in cases where the defendant chooses to represent himself, the court shall balance his rights to investigate the case against him with the rights of a victim to be free from intimidation. We would suggest similar assurances be included in the proposed legislation.

Under Title III of the omnibus bill, the sentencing court is encouraged, or in the case of probation or parole, is required to order the defendant to make appropriate restitution to the victim. Several of the ABA standards address restitution. Sentencing standard 18-2.3 lists "making restitution of the fruits of the crime or reparation for loss or damage caused thereby" among the appropriate (though not mandatory) conditions of probation. Two limitations to such restitution are noted: (1) the obligation should be tailored to the offender's ability to pay, and (2) it should not be enforced over a period that exceeds the maximum permissible period of probation. Similar limitations are contained in the bill before us.

Another standard, 18-2.7, provides that in determining whether to impose a fine and its amount, the court should consider the extent to which payment of a fine will interfere with the ability of the defendant to make any ordered restitution or reparation to the victim.

Title V of the proposed act concerns the development of Justice Department guidelines for fair treatment of crime victims and witnesses in the criminal justice system. We support this effort, and wish to take this early opportunity to offer our assistance to the Attorney General in this undertaking.

As I mentioned previously, our Victims Committee is developing a similar set of guidelines. Most of our recommendations will give formal recognition to and promote courtesies and considerations already extended to crime victims and witnesses in some jurisdictions. We are also considering several which would increase the influence of the victim in the criminal justice system by indirectly involving him or her in the charging and sentencing processes.

Our schedule calls for consideration of the proposed guidelines by the Section's governing Council in August and by the ABA's policy-making House of Delegates in February. We hope, of course, that they will eventually be adopted by state and local criminal justice agencies all over the country.

In closing, I want to offer my congratulations to your subcommittee. Victims, the forgotten individuals in our criminal justice system, have finally gotten a day "in court." We trust you will keep them in mind as you reach your verdict on this bill.

I will be glad to answer any questions.

ABA Summary

- The American Bar Association endorses the stated findings and purposes of the "Omnibus Victims Protection Act of 1982." A number of ABA policies relate directly to the proposed legislation.

- The ABA Criminal Justice Standards recommend that the sentencing court consider certain aggravating factors such as the vulnerability of the victim, cruelty toward the victim, and unnecessary bodily injury to the victim.

- The Standards recommend that the prosecuting attorney remain advised of the attitudes and sentiments of the victim before reaching a plea agreement. Moreover, under the Standards, the judge may allow or require the victim to testify prior to the court's acceptance of a plea of guilty.

- Recognizing that intimidation is a widespread and persistent problem, the ABA has approved a package of recommendations to reduce victim/witness intimidation. The package includes a model statute upon which many of the intimidation provisions in the omnibus bill are based. For instance, the definitions of "victim" and "witness" are similar. Both proposals make it a crime to maliciously deter victims and witnesses from participating in the investigation or prosecution of a criminal offense. Both provide that intimidation is grounds for revocation of a defendant's pretrial release. A major difference between the two proposals is that the ABA recommendations provide for both misdemeanor and felony offenses; the omnibus bill includes all offenses as felonies. Both proposals provide for civil remedies to restrain victim/witness intimidation; however, the ABA model statute specifies that where court orders are based on hearsay that the hearsay be credible; no such requirement is contained in the omnibus bill.

- Both the omnibus bill and ABA policy recognize restitution as an appropriate condition of probation.

- With respect to future policy development, the Victims Committee of the ABA's Criminal Justice Section is currently working on a set of guidelines for fair treatment of victims and witnesses in the criminal justice system, similar to that which the omnibus bill would require of the Attorney General. The Committee would hope to work with the Attorney General in this area.

Senator Laxalt. The subcommittee will be in recess.

[Whereupon, at 12 noon, the subcommittee recessed, to reconvene subject to the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

SUBMITTED TESTIMONY
OF

RONALD A. ZWEIBEL
Chairman of the
New York State Crime Victims Board
and
President of the
National Association of Crime Victim Compensation Boards

Before the
United States Senate
Judiciary Subcommittee on Criminal Law

Washington, D. C.
June 30, 1982

Introduction

Chairman Mathias and Distinguished Members of the Committee, my name is Ronald A. Zweibel. I am Chairman of the New York State Crime Victims Board and President of the National Association of Crime Victim Compensation Boards. I am grateful for the opportunity to submit testimony to your committee regarding the "Omnibus Victims Protection Act of 1982."

I would like to begin by commending you, Senator Mathias and the other Members of the United States Senate Judiciary Subcommittee on Criminal Law for demonstrating your interest in the "Omnibus Victims Protection Act of 1982" through the hearing held on May 27, 1982.

I respectfully submit the following analysis of the "Omnibus Victims Protection Act of 1982" which I recommend for approval by your subcommittee.

Title I - Victim Impact Statement

Historically, punishment has been measured as much by the mens rea, the state of the mind of the perpetrator, as well as actus rea, the result caused by the offender which can be fortuitous. By emphasizing the consequences to the victim rather than the motives of the offender, victim impact statements lend balance to the presentence information available to the court and therefore improve the quality of justice administered by the sentencing court.

Key to the viability of victim impact statements in justice proceedings is the language of the provision which states that: "The report shall......contain verified information stated in a nonargumentative style assessing the financial, social, psychological, and medical impact upon and cost to any person who was the victim of the offense committed by the defendant." Since the information in the victim impact statement will be verified and phrased in a nonargumentative style, concerns that the subjective feelings of victims will unduly influence sentencing decisions should be allayed.

Currently, five states, Indiana, Nevada, New Hampshire, Ohio, and South Carolina, are utilizing victim impact statements as useful tools in determining equitable penalities during the sentencing of a convicted offender. In addition, analogous legislation is pending in New York and several other states.

Title II - Protection of Victims and Witnesses from Intimidation

In 1976, an LEAA funded study found that in twenty-eight percent of all victims/witnesses surveyed, "fear of reprisal" was the most frequently cited reason for non cooperation. This can have a dramatic effect on the criminal justice process since thousands of cases must be dropped annually when victim/witnesses fail to appear or cooperate. In testimony before the American Bar Association Hearing on Victim/Witness Intimidation in July 1979, the Victim Services Agency reported that of 295 victims interviewed, as they began the court process and again after disposition, twenty-six percent had been threatened. In the latest National Crime Survey, Criminal Victimization in the United States, 1978, approximately seven percent of all crime goes unreported for the same reasons of "fear of reprisal".

. Thus, there can be seen an essential need to provide adequate measures to protect victims and witnesses, alike, from threats of harm and reprisal. The court must be enabled to order, if warranted, the type of protective measures needed. The protective orders may be simple in nature: an admonition from the court to the appropriate person(s) to refrain from engaging in "intimidating" conduct; or may be more intensive in nature: such as the relocation of a witness to ensure his/her health, safety, and welfare for as long as it is deemed necessary. By having the ability to provide these types of protective measures, cooperation with law enforcement and prosecutorial agencies will be increased and the overall effectiveness of the criminal justice system enhanced.

Title III - Restitution

The burden on innocent crime victims who suffer personal physical injury or death and incur financial hardship as a result of medical expenses, loss of wages or support, the repair or replacement of personal property, etc., is acknowledged to the degree possible through the availability of monetary awards from victim compensation programs in thirty-four states throughout the country. Although these compensation programs exist, many innocent crime victims find themselves excluded from any awards due to the rather specific parameters of the existing programs.

Crime victims also have the right to civil recovery for damages caused by victimization in the common law of torts and wrongful death statutes. Although this right is available, the realities of recovering losses from a criminal offender, who may be judgement proof, incarcerated or indigent, are not particularly promising. Thus, restitution plays an important role in guaranteeing the victim's right to be made whole. Although encumbered by some of the same practical problems as encountered with civil recoveries, restitution at least provides an alternative avenue for securing this basic right.

Restitution can serve the victim, the offender (considering its rehabilitative qualities) and ultimately society. By restoring victims to their previous condition and forcing the offender to take responsibility for any damages done, societal ties are strenghtened and public confidence in the criminal system is heightened.

Title IV - Federal Accountability for Escape or Release of a Federal Prisoner

One of the most serious failings of the criminal justice system, as highlighted by the Attorney General's Task Force on Violent Crime, is the lack of justice accorded to surviving crime victims who have been viciously and brutally attacked by a dangerous criminal unwittingly released by correctional or mental health officials or allowed to escape confinement. Even though government has obviously failed to protect victims and gross negligence can be proved, little recourse for these victims exists solely because suits filed against government are dismissed based on the provisions detailed in the doctrine of sovereign immunity.

There is a definite need to devise legislation which would carefully detail parameters for governmental responsibility for acts of gross negligence such that those administering custodial institutions and their decision making officials will become more effective and less likely to allow grossly negligent acts to occur. By enacting legislation of this type, the scale of justice will be restored to the point where the criminal justice system will once again help to protect and assist the victim.

Title V - Federal Guidelines for Fair Treatment of Crime Victims and Witnesses in the Criminal Justice System

1. Services to Victims of Crime -

The need for immediate information as to social services, financial assistance, and the criminal justice processes is extremely important to crime victims. Often times the victim suffers serious physical, psychological, and/or financial stress due to being victimized which can be alleviated, to the degree possible, through the knowledge of and participation in existing support services. This support, received from the very beginning, can encourage "functional reconstruction" of behavior to levels approximating the precrisis state. By giving crime victims the support necessary to "normalize" daily behavior, the confidence they have in the system will be increased which in turn will significantly impact on their ability and willingness to cooperate with the system as the need arises.

2-4. Scheduling Changes -
Prompt Notification to Victims of Major Serious Crimes -
Consultation with Victim -

In the past, the victim's place and interests in the system were much more central, but government gradually took over the prosecutorial role from the victim and relegated the crime victim to a mere informational source. By being treated as information sources, crime victims are often exposed to further hardships including: having to tell their story over and over again; appearing in court in anticipation of testifying; helping the police with identification; and a variety of other time consuming, frustrating, and psychologically difficult activities.

Regardless of these hardships, the information provided by the victim is essential to the continued functioning of the system. In this vein, due process must be afforded to the victim which is readily provided to the offender. It must be acknowledged that the interests which the system has in the cooperation and assistance that the victim can provide is no greater than the interests victims have in being informed, notified and in having their input considered in matters which so fundamentally affect their rights as people harmed by a society which has failed to protect them.

5. Separate Waiting Areas -

Because of the need to prevent further traumatization, crime victims should be provided with separate waiting areas during court proceedings. This is to ensure that victims and/or witnesses are not forced to repeatedly confront their alleged victimizer which can cause unneeded discomfort, and to ensure that victims are free from harrassment and/or intimidation from the defendant, and the defendant's family and friends. Also, it generally allows victims and witnesses a place to compose themselves and to do whatever they choose, during the frequently long waiting periods involved in court appearances.

6. Property Return -

Police and court property rooms are often overcrowded and seldom notified of the disposition of criminal cases. As a result, in a significant number of cases, the property is never returned to its owner. Even where property is eventually returned, victims are often deprived of the possessions and use of their property for months and years at a time. An expedited process is needed because of the inherent unfairness of crime victims in being deprived of the use of their property for prolonged periods.

Crime victims frequently complain that they are victimized twice; once by the offender and a second time by law enforcement agencies when they try to obtain the return of their property. The frustration many victims feel when attempting to recover their property often turns to outrage and cynicism. The enactment of this type of legislation can assist the criminal justice system through the restoration of confidence and support of crime victims and the public in general in the criminal justice system; thereby, lessening the ill feelings many citizens harbor against the system.

7. Notification to Employer -

This right, as with many of the others, flows from the initial fundamental right of protection that government owes to all of its members. Once this right to protection is abridged, when a victimization occurs, the crime victims and witnesses' duty to cooperate with law enforcement is triggered. At this point, government has an obligation to facilitate the required cooperation and to prevent further injustices. The injustice of having employers and creditors penalize cooperating victims/witnesses for fulfilling their duty to assist in criminal justice functions is appalling and only increases the total frustrations many victims/witnesses feel toward the whole court process. This potential increased burden is detrimental to both the victim/witness and to the system, and could be alleviated to a large extent by appropriate intercession services.

8. Training by Federal Law Enforcement Training Facilities -

When a crime has been committed often the first individuals crime victims encounter are law enforcement officials. Many crime victims complain that officials seem indifferent and distant, often totally detached from any human feeling for them. Since the crime victim has recently been treated with total disregard from the offender, the detached behavior exhibited by many law enforcement officials leaves the victim feeling even more violated.

In an effort to ameliorate the indifference and detachment exhibited by law enforcement officials an acknowledgement of the complexities of police work must be made such that constructive solutions can be formulated and implemented. These solutions should be in the form of better training; thereby, enabling law enforcement officials to be readily prepared for the many and difficult roles they must fill. If law enforcement officials receive specialized training designed to increase sensitivity and listening skills and to give them better interviewing and crisis intervention skills, the resultant effect will be an increase in satisfaction for both crime victims and law enforcement officials.

9. General Victim Assistance -

Aside from those services detailed in the proposed legislation, the need for other victim assistance services can be evidenced in the upsurgence and increased utilization of victim/witness assistance programs throughout this country. In the National Evaluation Program, Phase I: Assessment of Victim/Witness Assistance Projects prepared for the Law Enforcement Assistance Administration and released in May, 1980, victims and witnesses, alike, utilize various services under categorical headings of emergency services, counseling, police-related services, other direct services, and court-related services. Each victim and/or witness program was designed to meet the area specific needs of its clients which resulted in an increase in overall satisfaction that victims/witnesses and law enforcement officials felt concerning their roles in the entire criminal justice process.

Since the foundation has been laid within the constructs of this proposed Act to improve the linkage between victims/witnesses and the criminal justice system and to ensure that the needs exhibited by all actors in the system are met to the extent humanly possible, an ongoing oversight mechanism must be established to examine, analyze and modify service delivery to victims and witnesses to ensure it is provided in the most efficient and effective manner possible.

Title VI - Profit by a Criminal From Sale of His Story

During 1977, the City of New York was terrorized by random shootings of young women and their companions. Known as the "Son of Sam" killings, these crimes, as one could expect, generated widespread public notoriety and media attention.

As a result, publishers were willing to pay large sums of money for the murderer's story. Aware of this desire, New York State Senator Emanuel R. Gold proposed a bill that could prevent the criminal from reaping financial gain from his crimes.

Approved and effective on August 11, 1977, this bill became Section 632-a of the Executive Law and is commonly referred to as the "Son of Sam" law. (A copy of the current statute is attached.)

The State of New York, and in particular the Crime Victims Board which was given the duty of enforcing the provisions of this statute, has had the opportunity to work with this statute for the past five years. In this time period, the Board has gained a working knowledge of the statute and has been instrumental in the submission of amendments to the original bill which has ensured that the statute operates in an effective and efficient manner. Since enactment of New York's law approximately ten other states have enacted similar legislation.

Provisions of the law which the Board has found to be of great importance include:

1) The law creates a new statute of limitations commencing from the date the Board places money in an escrow account. The victim has five years from such date within which to commence a civil action. This provisions is critical in that the underlying statute of limitations on the intentional tort based upon the criminal act is usually one year. The commercial exploitation of the crime story will usually occur several years after the crime.

2) Subdivision II of the statute sets out priorities in the payment of claims. As many different interests may be competing for payment out of the escrow account, it is important that priorities be set forth. Included among these priorities is a provision for the limited payment of the criminals legal expenses incurred at any stage of the criminal proceedings against him.

3) The Board's rules contain administrative due process procedures providing the criminal with notice and an opportunity to be heard at the time the Board seizes funds and prior to distribution of the funds.

4) Adequate notice to the victim(s) of monies available. Subdivision II provides for publication of notices every six months for the entire five year period the escrow account exists.

5) The definitional sections of the law are also of great importance. Subdivision X specifically defines victim and a person convicted of a crime. In addition, the term "representative", Section 632-a, is defined in the Board's statute to be one "who represents or stands in the place of another person, including but not limited to an agency, an assignee, an attorney, a guardian, a committee, a conservator, a partner, a receiver, an administrator, an executor or an heir of another person, or a parent or a minor. This definition was necessitated by a court interpretation of the original statute. Holding that a court appointed conservator was not a "representative" of the accused and thus monies paid to a conservator were not subject to the statute, this ruling points out

the significance of precisely defining those third parties that the law applies to.

The Board also respectfully suggests that the Attorney General consider including the following points in any law that is drafted:

1) Monies collected should be escrowed by the U.S. Department of Justice.

2) The Federal Law should defer to state law in situations where a state has a "Son of Sam" type law which is applicable and enforceable. Where an analogous state law does not exist or is not capable of enforcement, the federal law should be made to apply to acts that are crimes under the U.S. Criminal Code, whether or not the person is or was actually prosecuted by the Federal Government.

3) Victim suits should be brought in the United States District Courts or United States Court of Claims and should receive calendar preference.

4) Federal income taxes on escrow funds should be waived or else the legal doctrine of "constructive receipt" of income may require that a large portion of funds available for victims will be paid to the Internal Revenue Service in taxes on income "received" by the perpetrator of the crime.

5) Subrogation rights of any state with a crime victim compensation program should be protected.

In closing, I would once again like to thank the committee for allowing me this opportunity to submit this testimony. It is through efforts such as that being conducted by this committee that the crime victim will one day be afforded his/her right and proper status in the criminal justice process.

ARTICLE 22

Crime Victims Compensation Board

EXECUTIVE LAW

8/79

EXECUTIVE LAW

Sec.
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§ 620. Declaration of policy and legislative intent

The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent upon public assistance. The legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.

§ 621. Definitions

For the purposes of this article:

1. "Board" shall mean the crime victims compensation board.
2. "Claimant" shall mean the person filing a claim pursuant to this article.
3. "Crime" shall mean an act committed in New York state which would, if committed by a mentally competent criminally responsible adult, who has no legal exemption or defense, constitute a crime as defined in and proscribed by the penal law, provided, however, that no act involving the operation of a motor vehicle which results in injury shall constitute a crime for the purposes of this article unless the injuries were intentionally inflicted through the use of a vehicle.
4. "Family", when used with reference to a person, shall mean (a) any person related to such person within the third degree of consanguinity or affinity, (b) any person maintaining a sexual relationahip with such person, or (c) any person residing in the same household with such person.
5. "Victim" shall mean a person who suffers personal physical injury as a direct result of a crime.

§ 622. Crime victims compensation board

1. There is hereby created in the executive department a board, to be known as the crime victims compensation board. Such board shall consist of five members, no more than three of whom shall belong to the same political party, who shall be appointed by the governor by and with the advice and consent of the senate. Three of the members appointed by the governor shall have been admitted to practice law in the state of New York for not less than five years next preceding their appointment.

2. The term of office of each such member shall be seven years. Any member appointed to fill a vacancy occurring otherwise than by expiration of a term shall be appointed for the remainder of the unexpired term.

3. The governor shall designate one member of the board as chairman thereof, to serve as such at the pleasure of the governor.

4. The members of the board shall devote their whole time and capacity to their duties, and shall not engage in any other occupation, profession or employment, and shall receive an annual salary to be fixed by the governor within the amount made available therefor by appropriation.

§ 623. Powers and duties of the board

The board shall have the following powers and duties:

1. To establish and maintain a principal office and such other offices within the state as it may deem necessary.

2. To appoint a secretary, counsel, clerks and such other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

3. To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of this article, including rules for the approval of attorneys' fees for representation before the board or before the appellate division upon judicial review as provided for in section six hundred twenty-nine of this article.

4. To request from the division of state police, from county or municipal police departments and agencies and from any other state or municipal department or agency, or public authority, and the same are hereby authorized to provide, such assistance and data as will enable the board to carry out its functions and duties.

5. To hear and determine all claims for awards filed with the board pursuant to this article, and to reinvestigate or reopen cases as the board deems necessary.

6. To direct medical examination of victims.

7. To hold hearings, administer oaths or affirmations, examine any person under oath or affirmation and to issue subpoenas requiring the attendance and giving of testimony of witnesses and require the production of any books, papers, documentary or other evidence. The powers provided in this subdivision may be delegated by the board to any member or employee thereof. A subpoena issued under this subdivision shall be regulated by the civil practice law and rules.

8. To take or cause to be taken affidavits or depositions within or without the state.

9. To establish and maintain a special investigative unit to expedite processing of claims by senior citizens and special emergency situations, and to promote the establishment of a volunteer program of home visitation to elderly and invalid victims of violent crime.

10. To advise and assist the governor in developing policies designed to recognize the legitimate rights, needs and interests of crime victims.

11. To coordinate state programs and activities relating to crime victims.

12. To cooperate with and assist political subdivisions of the state in the development of local programs for crime victims.

13. To study the operation of laws and procedures affecting crime victims and recommend to the governor proposals to improve the adminstration and effectiveness of such laws.

14. To establish an advisory council to assist in formulation of policies on the problems of crime victims.

15. To advocate the rights and interests of crime victims of the state before federal, state and local administrative, regulatory, legislative, judicial and criminal justice agencies.

16. To promote and conduct studies, research, analyses and investigations of matters affecting the interests of crime victims.

17. To sponsor conferences relating to the problems of crime victims.

18. To serve as a clearinghouse for information relating to crime victims problems and programs.

19. To accept, with the approval of the governor, as agent of the state, any grant including federal grants, or any gift for the purposes of this article. Any monies so received may be expended by the board to effectuate any purpose of this article, subject to the applicable provisions of the state finance law.

20. To render each year to the governor and to the legislature a written report on the board's activities and the manner in which the rights, needs and interests of crime victims are being addressed by the state's criminal justice system.

21. To contract for counseling services and to make such services available without charge to eligible persons as defined in section six hundred twenty-four of this article who are suffering traumatic shock as the result of a crime.

§ 624. Eligibility

1. Except as provided in subdivision two of this section, the following persons shall be eligible for awards pursuant to this article:

(a) a victim of a crime;

(b) a surviving spouse, parent or child of a victim of a crime who died as a direct result of such crime; and

(c) any other person dependent for his principal support upon a victim of a crime who died as a direct result of such crime.

2. A person who is criminally responsible for the crime upon which a claim is based or an accomplice of such person or a member of the family of such persons shall not be eligible to receive an award with respect to such claim.

§ 625. Filing of claims

1. A claim may be filed by a person eligible to receive an award, as provided in section six hundred twenty-four of this article, or, if such person is under the age of eighteen years or an incompetent, by his relative, guardian, committee, or attorney.

2. A claim must be filed by the claimant not later than one year after the occurrence of the crime upon which such claim is based, or not later than one year after the death of the victim, provided, however, that upon good cause shown, the board may extend the time for filing for a period not exceeding two years after such occurrence.

3. Claims shall be filed in the office of the secretary of the board in person or by mail. The secretary of the board shall accept for filing all claims submitted by persons eligible under subdivision one of this section and alleging the jurisdictional requirements set forth in this article and meeting the requirements as to form in the rules and regulations of the board.

4. Upon filing of a claim pursuant to this article, the board shall promptly notify the district attorney of the county wherein the crime is alleged to have occurred. If, within ten days after such notification, such district attorney advises the board that a criminal prosecution is pending upon the same alleged crime and requests that action by the board be deferred, the board shall defer all proceedings under this article until such time as such criminal prosecution has been concluded and shall so notify such district attorney and the claimant. When such criminal prosecution has been concluded, such district attorney shall promptly so notify the board. Nothing in this section shall limit the authority of the board to grant emergency awards pursuant to section six hundred thirty of this article.

§ 625-a. Information relative to claims; application forms

1. Every police station, precinct house, any appropriate location where a crime may be reported and any location required by the rules and regulations of the board shall have available informative booklets, pamphlets and other pertinent written information, to be supplied by the board, relating to the availability of crime victims compensation including all necessary application blanks required to be filed with the board. Every victim who reports a crime in any manner whatsoever shall be supplied by the person receiving the report with information and application blanks, if the address of the victim and his name are supplied.

1-a. Every general hospital established under the laws of this state, which maintains facilities for providing out-patient emergency medical care, shall display prominently in its emergency room posters giving notification of the existence and general provisions of this chapter. The board may issue guidelines for the location of such display and shall provide posters, application forms and general information regarding the provision of this chapter to each such hospital.

2. No cause of action of whatever nature or kind arising out of a failure to give or receive the notice required by this section shall accrue to any person against the state or any of its agencies or local subdivisions, or, any police officer or other agent, servant or employee thereof, or any hospital or agents or employees thereof, nor shall any such failure be deemed or construed to affect or alter any time limitation or other requirement contained in this article for the filing or payment of a claim hereunder.

§ 626. Out-of-pocket loss; definition

Out-of-pocket loss shall mean unreimbursed and unreimbursable expenses or indebtedness reasonably incurred for medical care or other services necessary as a result of the injury upon which such claim is based.

§ 627. Determination of claims

1. A claim, when accepted for filing, shall be assigned by the chairman to himself or to another member of the board. All claims arising from the death of an individual as a direct result of a crime, shall be considered together by a single board member.

2. The board member to whom such claim is assigned shall examine the papers filed in support of such claim. The board member shall thereupon cause an investigation to be conducted into the validity of such claim. Such investigation shall include, but not be limited to, an examination of police, court and official records and reports concerning the crime and an examination of medical and hospital reports relating to the injury upon which such claim is based.

3. Claims shall be investigated and determined, regardless of whether the alleged criminal has been apprehended or prosecuted for or convicted of any crime based upon the same incident, or has been acquitted, or found not guilty of the crime in question owing to criminal irresponsibility or other legal exemption.

4. The board member to whom a claim is assigned may decide such claim in favor of a claimant in the amount claimed on the basis of the papers filed in support thereof and the report of the investigation of such claim. If the board member is unable to decide such claim upon the basis of such papers and such report, he shall order a hearing. At such hearing any relevant evidence, not legally privileged, shall be admissible.

5. After examining the papers filed in support of such claim and the report of investigation, and after a hearing, if any, the board member to whom such claim was assigned shall make a decision either granting an award pursuant to section six hundred thirty-one of this article or deny the claim.

6. The board member making a decision shall file with the secretary a written report setting forth such decision and his reasons therefor. The secretary shall thereupon notify the claimant and furnish him a copy of such report.

§ 628. Consideration of decisions by board

1. The claimant may, within thirty days after receipt of the report of the decision of the board member to whom his claim was assigned, make an application in writing to the chairman of the board for consideration of such decision by the board.

2. Any member of the board may, within thirty days after the filing of such report, make an application in writing to the chairman of the board for consideration of such decision by the board.

3. Upon receipt of an application pursuant to subdivision one or two of this section, the chairman of the board shall designate three members of the board not including the board member who made the decision to review the record and affirm or modify the decision of the board member to whom the claim was assigned. For the purpose of such review the three members of the board so designated shall constitute the board. The action of the board in affirming or modifying such decision shall be the final decision of the board. The board shall file with the secretary of the board a written report setting forth its decision, and if such decision varies in any respect from the report of the board member to whom the claim was assigned setting forth its reasons for such decision. If the chairman of the board receives no application pursuant to subdivision one or two of this section, the decision of the board member to whom the claim was assigned shall become the final decision of the board.

4. The secretary of the board shall promptly notify the claimant, the attorney general and the comptroller of the final decision of the board and furnish each with a copy of the report setting forth such decision.

§ 629. Judicial review

1. Within thirty days after receipt of the copy of the report containing the final decision of the board, the attorney general may, if in his judgment the award is illegal or excessive, commence a proceeding in the appellate division of the supreme court, third department, to review the decision of the board. Within thirty days after receipt of the copy of such report, the comptroller may, if in his judgment the award is illegal or excessive, request the attorney general to commence a proceeding in the appellate division of the supreme court, third department, to review the decision of the board in which event the attorney general shall commence such a proceeding. Such proceeding

shall be heard in a summary manner and shall have precedence over all other civil cases in such court. Any claimant aggrieved by a final decision of the board may commence a proceeding to review that decision pursuant to article seventy-eight of the civil practice law and rules.

2. Any such proceeding shall be commenced by the service of notice thereof upon the claimant and the board in person or by mail.

§ 630. Emergency awards

Notwithstanding the provisions of section six hundred twenty-seven of this article, if it appears to the board member to whom a claim is assigned, that such claim is one with respect to which an award probably will be made, and undue hardship will result to the claimant if immediate payment is not made, such board member may make one or more emergency awards to the claimant pending a final decision of the board or payment of an award in the case, provided, however, that (a) the amount of each such emergency award shall not exceed five hundred dollars, (b) the total amount of such emergency awards shall not exceed fifteen hundred dollars, (c) the amount of such emergency awards shall be deducted from any final award made to the claimant, and (d) the excess of the amount of any such emergency award over the amount of the final award, or the full amount of any emergency awards if no final award is made, shall be repaid by the claimant to the board.

§ 631. Awards

1. No award shall be made unless the board or board member, as the case may be, finds that (a) a crime was committed, (b) such crime directly resulted in personal physical injury to, or death of, the victim, and (c) police records show that such crime was promptly reported to the proper authorities; and in no case may an award be made where the police records show that such report was made more than one week after the occurrence of such crime unless the board, for good cause shown, finds the delay to have been justified.

2. Any award made pursuant to this article shall be in an amount not exceeding out-of-pocket expenses, including indebtedness reasonably incurred for medical or other services necessary as a result of the injury upon which the claim is based, together with loss of earnings or support resulting from such injury.

3. Any award made for loss of earnings or support shall, unless reduced pursuant to other provisions of this article, be in an amount equal to the actual loss sustained, provided, however, that no such award shall exceed two hundred fifty dollars for each week of lost earnings or support, and provided further that the aggregate award for such loss shall not exceed twenty thousand dollars or an amount determined by the board in excess of twenty thousand dollars, provided that such amount in excess of twenty thousand dollars is fully reimbursable to the board by available federal funds. If there are two or more persons entitled to an award as a result of the death of a person which is the direct result of a crime, the award shall be apportioned by the board among the claimants.

4. Any award made pursuant to this article shall be reduced by the amount of any payments received or to be received by the claimant as a result of the injury (a) from or on behalf of the person who committed the crime, (b) under insurance programs mandated by law, (c) from public funds, (d) under any contract of insurance wherein the claimant is the insured or beneficiary, (e) as an emergency award pursuant to section six hundred thirty of this article.

5. In determining the amount of an award, the board or board member, as the case may be, shall determine whether, because of his conduct, the victim of such crime contributed to the infliction of his injury, and the board or board member shall reduce the amount of the award or reject the claim altogether, in accordance with such determination; provided, however, that the board or board member, as the case may be, may disregard for this purpose the responsibility of the victim for his own injury where the record shows that such responsibility was attributable to efforts by the victim to prevent a crime or an attempted crime from occurring in his presence or to apprehend a person who had committed a crime in his presence or had in fact committed a felony.

6. If the board or board member, as the case may be, finds that the claimant will not suffer serious financial hardship, as a result of the loss of earnings or support and the out-of-pocket expenses incurred as a result of the injury, if not granted financial assistance pursuant to this article to meet such loss of earnings, support or out-of-pocket expenses, the board or board members shall deny an award. In determining such serious financial hardship, the board or board member shall consider all of the financial resources of the claimant. The board shall establish specific standards by rule for determining such serious financial hardship.

7. Notwithstanding the provisions of subdivision six of this section, an award shall include out-of-pocket expenses, including indebtedness reasonably incurred by the victim of a sex offense or the person responsible for the victim of such sex offense, as such sex offense is defined in article one hundred thirty of the penal law, for a hospital or medical examination in connection with the investigation or prosecution of any such offense.

§ 632. Manner of payment

1. The award shall be paid in a lump sum, except that in the case of death or protracted disability the award shall provide for periodic payments to compensate for loss of earnings or support. No award made pursuant to this article shall be subject to execution or attachment other than for expenses resulting from the injury which is the basis for the claim.

2. Where a person entitled to receive an award is a person under the age of eighteen years or an incompetent, the award may be paid to a relative, guardian, committee, or attorney of such person on behalf of and for the benefit of such person. In such case the payee shall be required to file a periodic accounting of the award with the board and to take such other action as the board shall determine is necessary and appropriate for the benefit of the person under the age of eighteen years or the incompetent.

§ 632-a. Distribution of moneys received as a result of the commission of crime

1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative

of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.

2. The board, at least once every six months for five years from the date it receives such moneys, shall cause to have published a legal notice in newspapers of general circulation in the county wherein the crime was committed and in counties contiguous to such county advising such victims that such escrow moneys are available to satisfy money judgments pursuant to this section. For crimes committed in a county located within a city having a population of one million or more, the notice provided for in this section shall be in newspapers having general circulation in such city. The board may, in its discretion, provide for such additional notice as it deems necessary.

3. Upon dismissal of charges or acquittal of any accused person the board shall immediately pay over to such accused person the moneys in the escrow account established on behalf of such accused person.

4. Upon a showing by any convicted person that five years have elapsed from the establishment of such escrow account and further that no actions are pending against such convicted person pursuant to this section, the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives.

5. For purposes of this section, a person found not guilty as a result of the defense of mental disease or defect pursuant to section 30.05 of the penal law shall be deemed to be a convicted person.

6. Whenever it is found, pursuant to article seven hundred thirty of the criminal procedure law,[1] that a person accused of a crime is unfit to proceed as a result of mental disease or defect because such person lacks capacity to understand the proceedings against him or to assist in his own defense, the board shall bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules to determine disposition of the escrow account.

7. Notwithstanding any inconsistent provision of the civil practice law and rules with respect to the timely bringing of an action, the five year period provided for in subdivision one of this section shall not begin to run until an escrow account has been established.

8. Notwithstanding the foregoing provisions of this section the board shall make payments from an escrow account to any person accused or convicted of crime upon the order of a court of competent jurisdiction after a showing by such person that such moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the proceedings against such person, including the appeals process.

9. Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this section shall be null and void as against the public policy of this state.

§ 633. Confidentiality of records

The record of a proceeding before the board or a board member shall be a public record; provided, however, that any record or report obtained by the board, the confidentiality of which is protected by any other law or regulation, shall remain confidential subject to such law or regulation.

§ 634. Subrogation

Acceptance of an award made pursuant to this article shall subrogate the state, to the extent of such award, to any right or right of action accruing to the claimant or the victim to recover payments on account of losses resulting from the crime with respect to which the award is made.

§ 635. Severability of provisions

If any provision of this article or the application thereof to any person or circumstances is held invalid, the remainder of this article and the application of such provision to other persons or circumstances shall not be affected thereby.

STATEMENT OF DEBORAH P. KELLY

DEPARTMENT OF GOVERNMENT AND POLITICS
THE UNIVERSITY OF MARYLAND
COLLEGE PARK, MARYLAND

CONCERNING S. 2420

OMNIBUS VICTIMS PROTECTION ACT OF 1982

HEARINGS: May 27, 1982

SUBMITTED TO SUBCOMMITTEE ON CRIMINAL LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

I am delighted to submit testimony in support of this legislation which finally recognizes the real people behind the crime statistics--the victims. We know a great deal about the rights of defendants, the role of prosecutors, the decisions of judges; yet we know little about the impact of crime on the injured party.

Crime victims are easily ignored. Once an arrest is made, the state usually has no incentive to consider victims' concerns. Cases are frequently dismissed or plea bargained. Victims are not needed, and therefore rarely are consulted or informed of case developments. The judicial process is not structured to pay any special attention to victims; it is oriented toward the accused; it is a criminal justice system. Police and court procedures are designed to recognize and protect the rights of the accused and the system's need for efficiency, even if these needs are met at the victim's expense.

The victim's role is to serve as state's evidence, provide information on demand, and gracefully drop out of the picture except in those few cases which come to trial. A sociologist described it succinctly, "Their role seems much like an expectant father in the hospital at delivery time: necessary for things to have gotton underway in the past, but at the moment rather superfluous and mildly bothersome."[1] Victims have no standing in court, no right to choose counsel, no right to an appeal, no control over the prosecution of their case, and no voice in its disposition. Once the state takes over victims are at best, relegated to the status of "witness", an "invisible threat" to be brought in only if the plea bargaining process breaks down.

The Omnibus Victims Protection Bill of 1982 would redress this inequity and provide a place for victims in the judicial process without taking away from the defendant's rights. The bill balances the rights of the accused, the administrative constraints of the state, and the pressing needs of crime victims.

My comments today and support for this bill are based on a two-year study of victims in the criminal justice system which I conducted while a guest scholar at the Brookings Institution. In the course of this study, I interviewed over 100 adult female rape victims in the Washington metropolitan area to learn how they were treated by prosecutors and police. Their responses underscore the need for this legislation, especially guidelines for fair treatment and victim impact statements, two provisions I will focus on today.

What did victims think of police and courts? Victims were least satisfied with prosecutors, most satisfied with detectives. When their attitudes toward police and courts changed after their case, they generally improved toward police and declined toward courts. Why? Victims' primary objection was that they were treated as evidence, not as people. They were excluded from deliberations and denied information about case developments. To illustrate, eighty percent of the women whose cases were plea bargained said they were never consulted during negotiations or told the outcome of the plea. Those who knew the outcome were more troubled when charges were dropped than when sentences were reduced. A Washington, D.C. rape victim, for example, was infuriated when she learned the prosecutor agreed to drop the rape charge if the defendant pleaded guilty to a series of burglaries and robberies he had also committed. In her words:

> I let him have it. I said 'Are you telling me that after all I've gone through you're going to drop the charge? Do you know what an effect this has had on my life? Do you know what it's like to have two kids knowing that there are guys out there who do this, that there is a man out there who knows where I live? Do you know what it's like to walk down the street and want to break into a run when someone is behind you? You've lost something that can't be replaced. You've lost your freedom. They can return your property but they can't replace your sense of security. All this has happen to me and now you're going to pretend it didn't--that he just robbed a few people. It's a lie. He raped me and it should go on record.'

Most victims felt they were denied particiaption (59%) and information about their case (49%), while some also felt their interests were not represented by prosecutors (28%). Despite victim-witness units, most victims had no idea what, if anything, was being done about their case. They took time off to look at mugshots, spent their lunch hours attending lineups, and used their vaction time to tell a group of strangers an incident they would rather forget. And what did they get in return? Often nothing, not even the courtesy of a phone call informing them whether their assailant was arrested and if arrested, whether he was in jail, on bail or roaming the neighborhood.

This communication gap causes much crime to go unpunished. Prosecutors cite witness problems as the number one reason why crimes are dismissed. But victims say they were not uncooperative, no one told them when to show up and what to do.[2] No one explained the meaning of all the fancy legal terms. Consequently, victims were often frightened by court procedures. Consider one woman's reaction when subpoenaed. "It scared me out of my shadow. I thought I was under arrest," and another's reaction to the grand jury, "It was like a warped poetry reading."

The Omnibus Victims Protection Bill would help close that gap by providing federal standards which require that victims be notified of case developments. In doing so, the bill would alleviate a major source of victims' complaints about the judicial process.

Beyond supplying victims with information about their case, the bill would encourage the use of victim-impact statements and thereby address a second critical concern of crime victims--their irrelevance to the case. Many victims were troubled to learn their personal interest in the crime was not recognized in the judicial process. As a Virginia women put it "You could be in Arizona and they would handle the whole case without you." The state may choose to do nothing or "throw the book" at the offender. The case many be brought to trial, plea bargained, or dismissed. Whatever the outcome, whatever the punishment, the decision is not up to victims. Indeed, their opinion is rarely solicited. Instead, what was once personal, private matter becomes the business of strangers, to be handled at their discretion. This tranfer of interest displeased many victims. A Maryland resident explained, "It killed me when I got the subpoena saying, The State v _____. He didn't do shit to the state, he did it to me and what he did to me was swept under the rug!"

Some victims felt betrayed when they learned there was no room in the judicial process for their opinion. A Washington woman exclaimed:

> Why do criminals have more rights than victims? They get to choose counsel and have these continuances while the victims who broke no law--gets run through the hoop. You are stuck with the lawyer they give you, you are left out of what's going on, and then they don't want to violate his privacy. What about mine?

Victim-impact statements provide an important outlet for victims' concerns. The symbolic importance of victim impact statements may surpass its actual effect on sentencing. Victim impact statements institutionalize victims' role in the process and allow for consideration of the personal costs of crime.

Many have resisted such efforts to expand victims' participation in the judicial process. Prosecutors, for example, have argued that if victims' opinions were solicited, it would introduce "inaccurate and unsupported ideas and the possibility of revenge into the legal system." They warned that "criminal courts would be used as a forum for personal vendettas and family fights."[3]

Research refutes this and indicates that victims are not an irrational group driven by the desire for vengence. A 1979 experiment in Dade County, Florida, for example, structured pretrial settlement conferences so that negotiation were conducted in front of the judge, victim, arresting officer, and felony defendant. Attendance by victims and police officers was not mandatory and victims, though consulted, were not given the power to veto decisions. The results: victims did not demand prosecutors "throw the book" at offenders, but routinely agreed to what the two attorneys negotiated.[4] In Pima County, Arizona defendants can not be admitted to county diversion programs without victims' approval. Since the program began in 1973, less than five percent of victims vetoed their offender's participation in this program.[5] A study comparing victims of personal crime to victims of property crime reached similar conclusions. Personal crime victims were less vengeful than property crime victims.[6]

My research supports these findings. Rape victims were surprisingly compassionate toward their assailants, especially considering the severity of their assaults. Statistical analysis of victims' responses revealed that victims were more concerned with how they were treated than what happened to their assailants. Specifically, treatment explained 48 percent of variance in victims' satisfaction with police and 64 percent of variance in their satisfaction with prosecutors. Verdict explained less than 12 percent of victims' satisfaction with police, and 8 percent of victims' satisfaction with prosecutor. In short, retribution was not the sole concern of victims. Victims clearly wanted their assailants convicted, but conviction was not key to their evaluations of police and courts. Instead, their satisfaction primarily depended on being included in decision-making, informed of case developments, and treated courteously, Clearly, these victims were not a bloodthirsty lot. Embracing victims' interests would humanize, not threaten the judicial process.

It is essential that the judicial process begin to pay attention to victims' interests.

Victims are consumers of the criminal justice system. As with other consumer complaints, when one person has a bad experience with a restaurant or a movie, the story spreads. Others avoid the same restaurant, skip the movie. The same holds true for the court system. The lack of enthusiasm displayed by many citizens summoned to jury duty and the creative reasons they offer to be excused from such service provide an example of citizens' reluctance to participate in the court system. Indeed, contrary to the rule with other institutions, the more contact people have with the courts, the lower their opinion.[7]

We can not ignore victims without paying a price. Eighty-seven percent of all crime comes to the attention of police only because victims report.[8] If they decide to cut their loses and spare themselves the bother of pressing charges, todays' crime problems may seem minor compared to what the future will bring.

The criminal justice system requires the cooperation of victims in order to function, for although the state brings the case, without victims' cooperation, they may be no case. In one women's words:

> I wouldn't go through it again. It was treated like a non-entity. I was trying to be a good citizen. I would have gone through it if only they'd treated me as a person. But the U.S. Attorney took the case and moved me right out of the picture. He never once asked my opinion. He told me what he had decided. I felt like a criminal, like I was cluttering the picture with this rape. I'd never cooperate again. If I'm ever raped again, I hope he kills me.

We provide little incentive for victims to press charges. At best, we offer them the "spiritual satisfaction" that comes from seeing their assailant put away, an outcome that happens infrequently. The odds of arrest are slim (19%), the odds of conviction and incarceration even slimmer (3%). If we invested our money, the way we ask victims to invest their time, we would soon be broke.

Because we ask victims to sacrifice their time and privacy, the least we can do is guarantee that when they cooperate with law enforcement they will be treated with dignity. Victims' status and satisfaction with the judicial process may be improved by instituting reforms which expand their involvement and recognize that crime involves parties other than the state and the defendant.

The Omnibus Victims Protection Bill of 1982 is such a reform. This bill would expand civil liberties to include victims without decreasing the rights of the accused. Victims' rights and defendants' rights are related but separate issues. To do something for victims is not the same as doing something to defendants. To equate the two cheapens victims' concerns and disguises the true extent of their injury. The Omnibus

Victims Protection Bill is a welcome step toward expanding our concept of due process to embrace the rights of victims.

FOOTNOTES

[1] William McDonald as quoted in Duncan Chappell and John Monahan, eds, Violence and Criminal Justice (N.Y. : Lexington Books, 1975), p. 63.

[2] Frank Cannavele, Witness Cooperation (Lexington. Mass. D.C. Heath,) 1975.

[3] quoted in Edward Zeigenhagen, Victims, Crime, and Social Control (New York: Praeger Publishers, 1977) p. 101. See also David Neubauer, "After the Arrest" in Atkins and Pogrebin, The Invisible Justice System (Ohio: Anderson Books, 1978) p. 173.

[4] Anne Heinz and Wayne Kerstetter, "Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining, Law and Society Review, v. 13, (Winter 1979) pp.349-366.

[5] Most offenders involved property crimes and exclude repeat offenders.

[6] G.L.A. Smale and H.L.P. Spickenheuer, "Feelings of Guilt and the Need for Retaliation in Victims of Serious Crimes Against Property and Person, Victimology, v.4, 1979, pp.75-85.

[7] Yankelovich Skelly, and Wright, The Public Image of the Courts, LEAA, Washington, D.C., 1978.

[8] R.O. Hawkins, "Who Called the Cops? Decisions to Report Criminal Victimization" Law and Society Review, 1973, p. 441.

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